

91-507

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PATRICIA JOAN THOMPSON, PETITIONER

-VS-

DISTRICT OF COLUMBIA

AND

ALFRED MAURY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

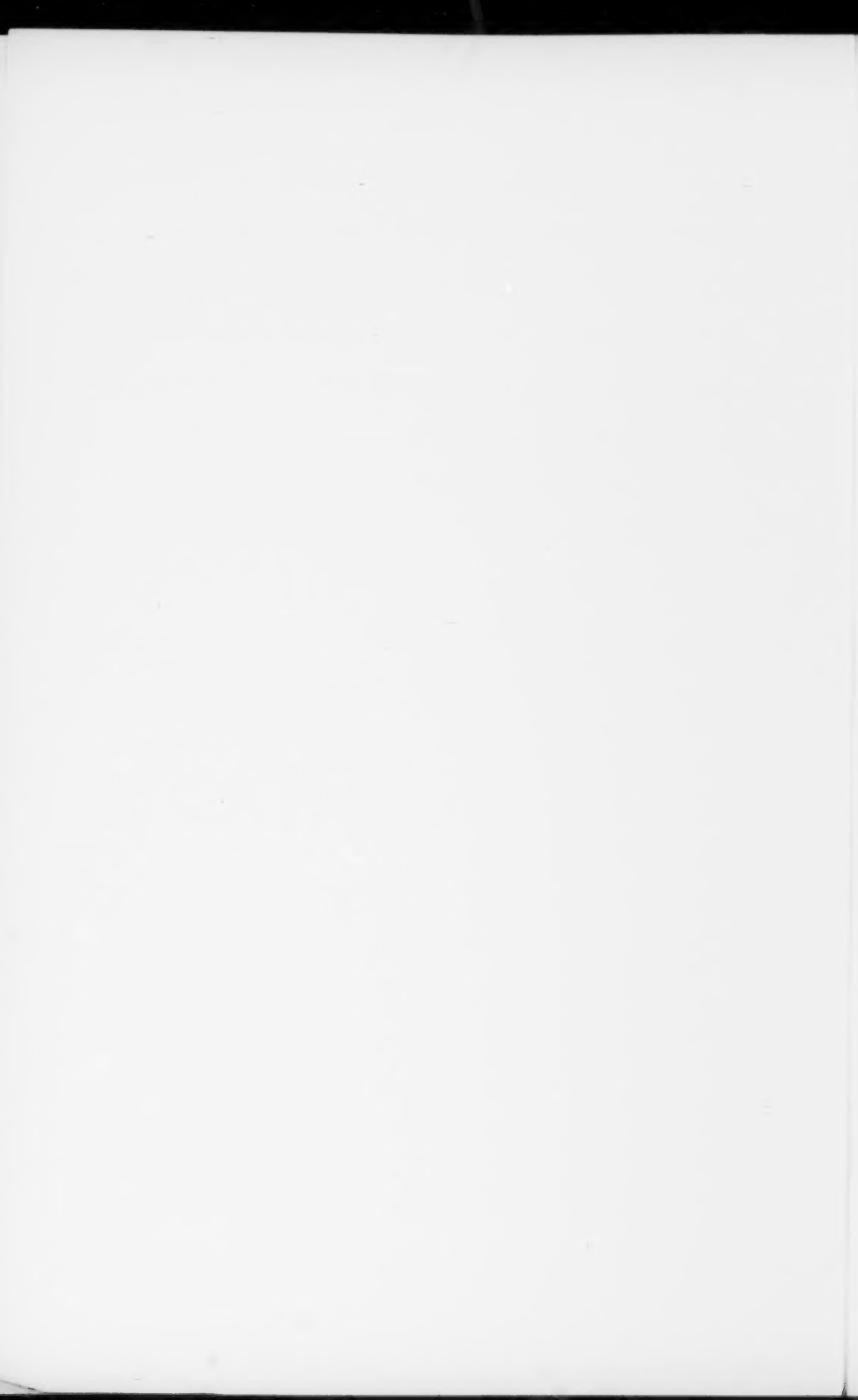
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September 16, 1991



QUESTIONS PRESENTED

Did the District of Columbia Court of Appeals err by ascribing legislative intent to destroy common law rights under the District's Comprehensive Merit Personnel Act, where the plain language of the statute and the legislative history militate against such a conclusion?



LIST OF PARTIES

The parties to the proceedings in the courts below relevant to this petition are the petitioner, Patricia Joan Thompson; the respondents herein, the District of Columbia and Alfred Maury.

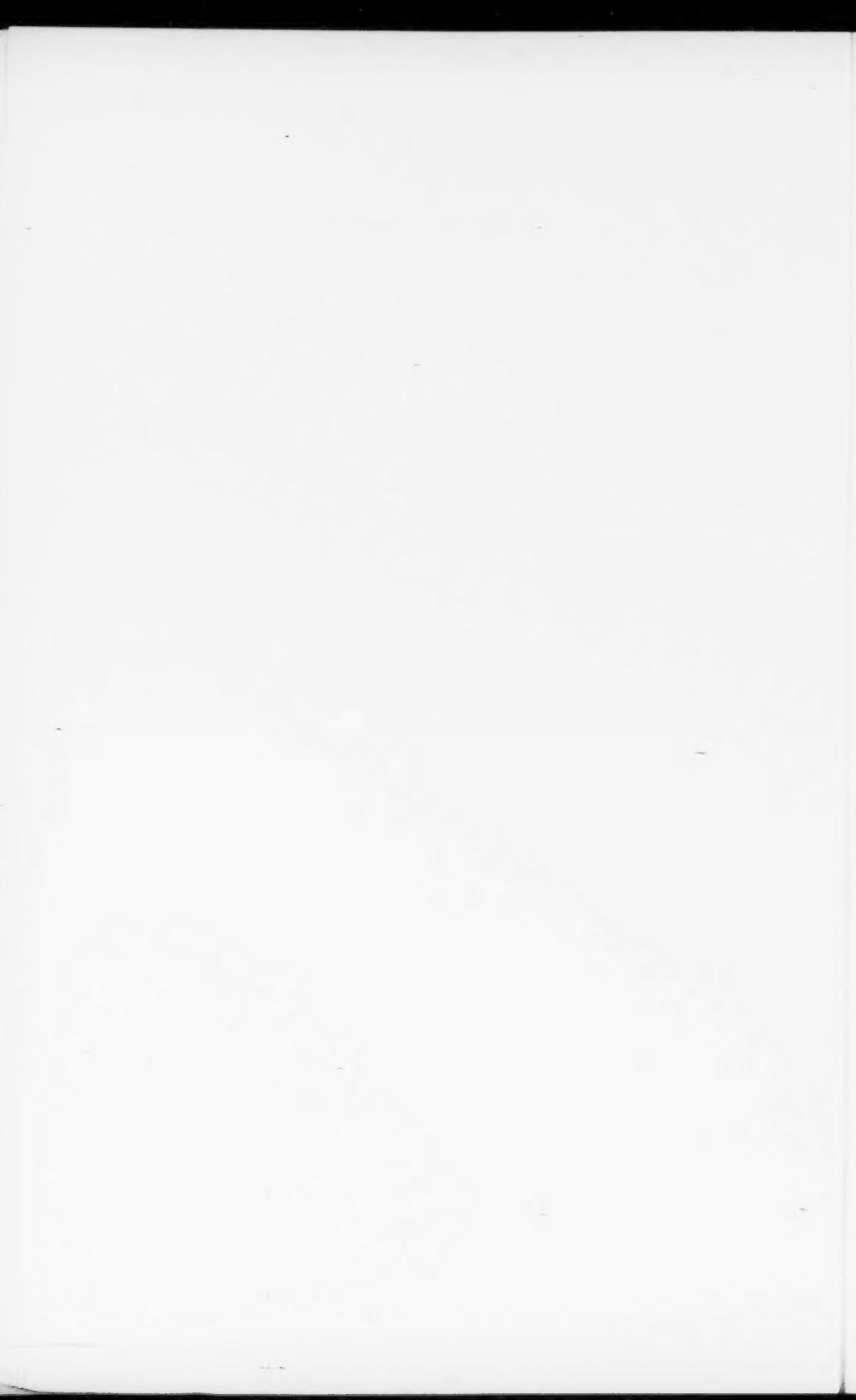


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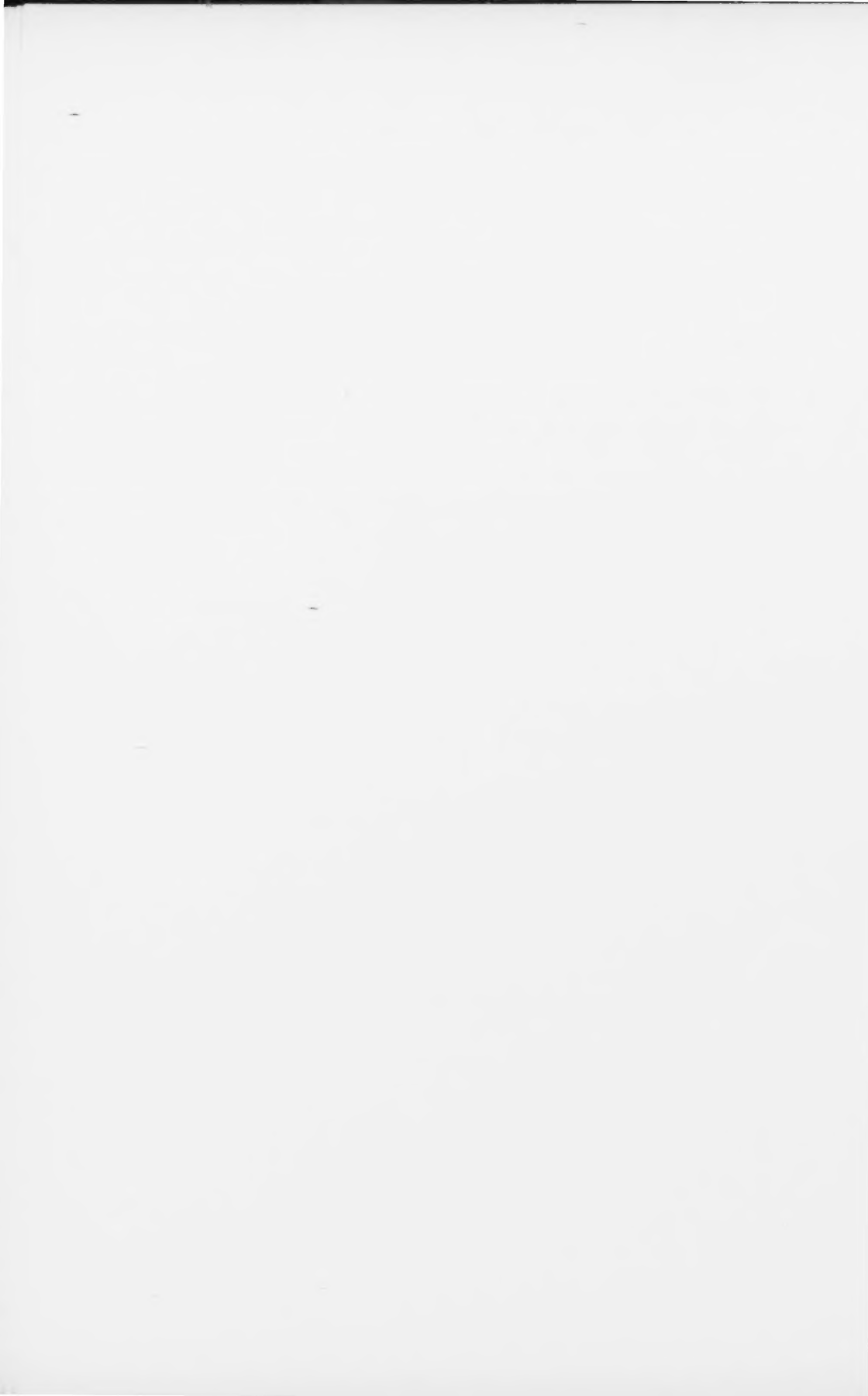
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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals, on Petition for Rehearing, decided on June 17, 1991 is not yet published. It is reprinted in the appendices herein, p. 1a infra. Thompson II.

The opinion of the District of Columbia Court of Appeals, from the Superior Court of the District of Columbia, decided on February 12, 1990, is reported at 570 A.2d 277 (D.C. App. 1990). It is reprinted in the appendices herein, p. 88a infra. Thompson I.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PATRICIA JOAN THOMPSON, PETITIONER

-VS-

DISTRICT OF COLUMBIA

AND

ALFRED MAURY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Petitioner Patricia Joan Thompson respectfully asks that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals, entered in the above styled proceeding on June 17, 1991.

JURISDICTION

Petitioner sued the District of Columbia and her supervisor, Alfred Maury, in the Superior Court for the District of Columbia, for intentional infliction of emotional distress, defamation, and assault and battery, resulting from her termination on August 5, 1983. The jury found for the petitioner and awarded damages for assault, defamation and intentional infliction of emotional distress.

The District of Columbia and Maury, respondents herein, filed an appeal. The District of Columbia Court of Appeals, in its opinion and order filed February 12, 1990, agreed with the respondents' claims of error, reversing and remanding the case.

After issuance of the first opinion and order, the District and Maury petitioned for rehearing.

On October 2, 1990 the District of Columbia Court of Appeals granted the respondents'



petition for rehearing.

In its second opinion and order, filed on June 17, 1991, the District of Columbia Court of Appeals considered the question of whether the provisions of the Comprehensive Merit Personnel Act preclude common law tort actions against the District of Columbia and one of its employees in that common law claims against the District are precluded by the exclusivity provision of the disability compensation portion of the Comprehensive Merit Personnel Act. The Court of Appeals was, subsequently persuaded by the respondents' arguments finding that common law actions in tort are precluded under the Districts statutory scheme.

Accordingly, Petitioner, pursuant to 28 U.S.C. § 1257 (1988), seeks a writ of certiorari from this Court to review the judgment of June 17, 1991.



STATUTES INVOLVED

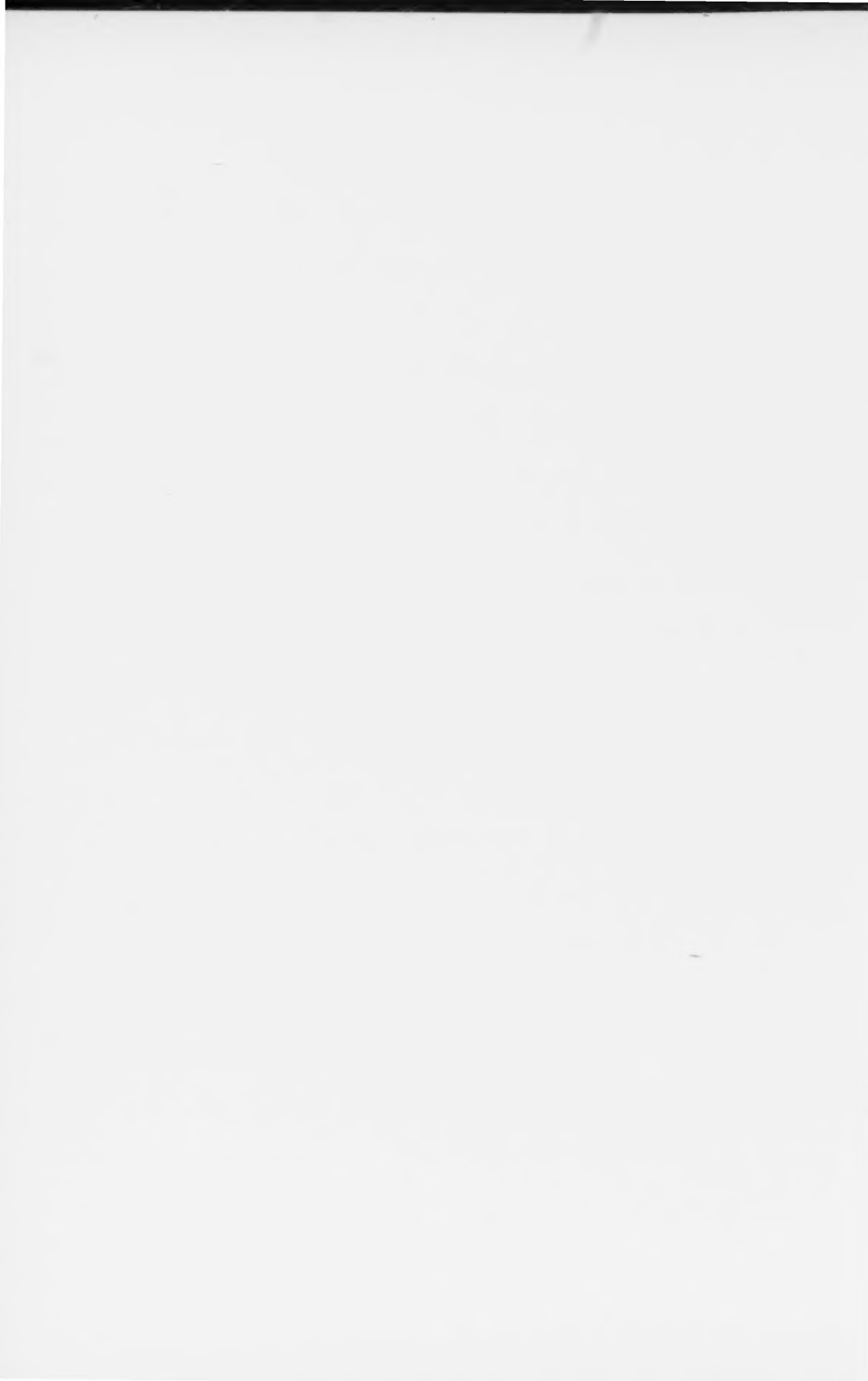
District of Columbia Merit Personnel Act

D.C. Code § 1-624.1 to 624.46 (1987)

STATEMENT OF THE CASE

The petitioner Patricia Joan Thompson was an employee of the District of Columbia, the governmental defendant in the underlying civil action in the Superior Court of the District of Columbia, and was employed by the District of Columbia Public Library. The petitioner was supervised by Alfred Maury the individual defendant.

Insofar as is relevant to this petition, while in the employ of the D.C. Public Library Ms. Thompson was the victim of a concerted effort to discredit and defame her, was the victim of intentional infliction of emotional distress visited upon her by those seeking to discredit and defame her, and ultimately was the victim of an assault and battery at the



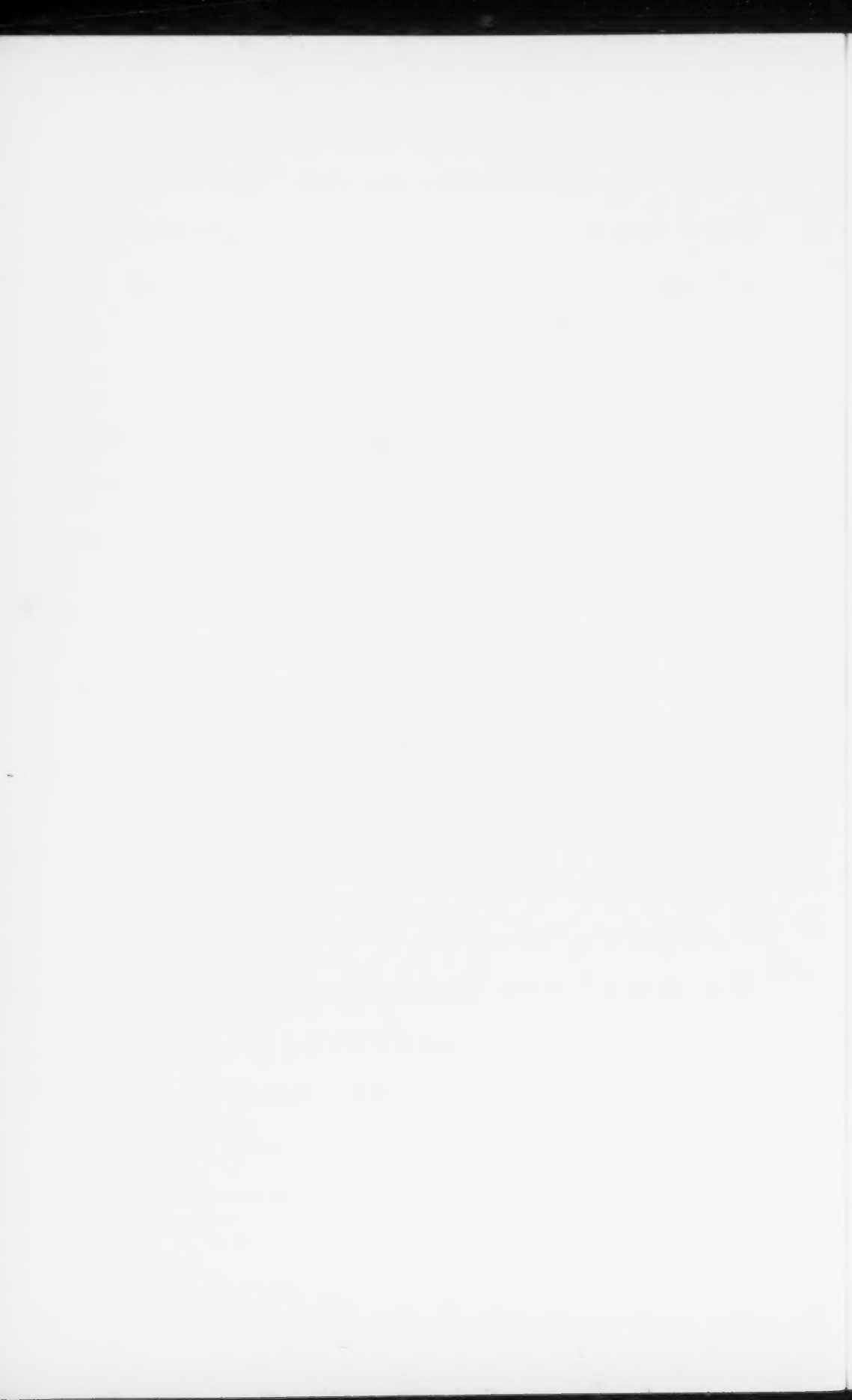
hands of her supervisor.

For a period of ten years Ms. Thompson, a single black female struggling to survive, had more than a satisfactory record of service and her performance ratings reflect that. It was not until a new supervisor was assigned to her branch that the situation began to deteriorate. To Thompson her supervisor's recent promotion and lack of experience were problems, as was his inability to assist her to continue to grow professionally. When Thompson was assigned to the branch in Northeast Washington there was no need for her there nor was there a position for her to fill. Maury, himself recently assigned to the Northeast branch, was in his first supervisory position. In that capacity, whether by direction or his own initiative, Maury engaged in a pattern of abuses directed at Thompson in an effort to drive her out of the D.C. Public Library. In fact his very first memorandum concerning Thompson recommended that she be



dismissed. Thereafter, over a period of two years, notwithstanding the fact that Thompson continued to receive satisfactory performance ratings and step increases, Maury authored twenty two (22) memoranda critical of Thompson. Additionally, Maury failed to consider her for promotion to the next grade level or to give her additional training she requested. As a result of Maury's refusal to grant Thompson the computer test she had requested Thompson filed a grievance. Subsequently, Thompson filed a complaint with the Equal Employment Opportunity Commission requesting computer training. The EEOC officer suggested that Thompson be given the training but Maury refused.

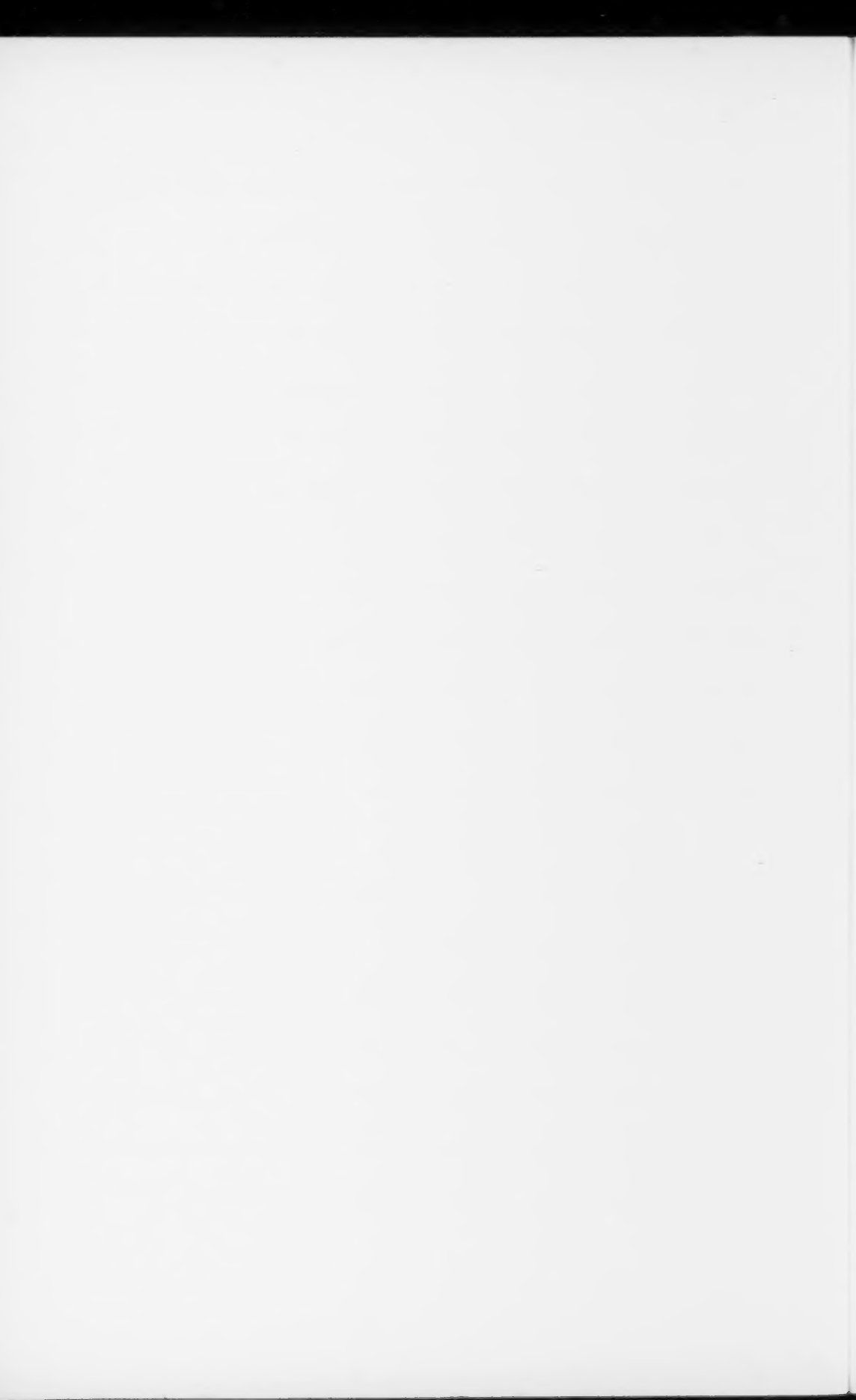
It was the aftermath of the grievance proceeding that brought the dispute into high relief with particular focus on Thompson's "excessive leave". However, aside from the fact that the majority of the leave taken was for medical reasons, all the leave was



approved with the exception of two instances. The two instances in question were the subject of memoranda by Maury, one of which was patently false. Nevertheless, despite the hue and cry raised by Maury, when Thompson received final termination payment from the District of Columbia she received monies for leave that she had accrued but not taken.

On May 24, 1983 Maury gave Thompson a letter of warning about incorrect leave taking. This letter upset Thompson and in turn led to the altercation with Maury. It was on the 25th of May that Maury assaulted and battered Thompson after an exchange of words between the parties. Maury, skilled at papering his victim, drafted a memo explaining his version of the events and recommending, yet again, that Thompson be dismissed. Maury's supervisor, Washington, and Washington's supervisor, Sweeney, concurred with Maury's recommendation to fire Thompson.

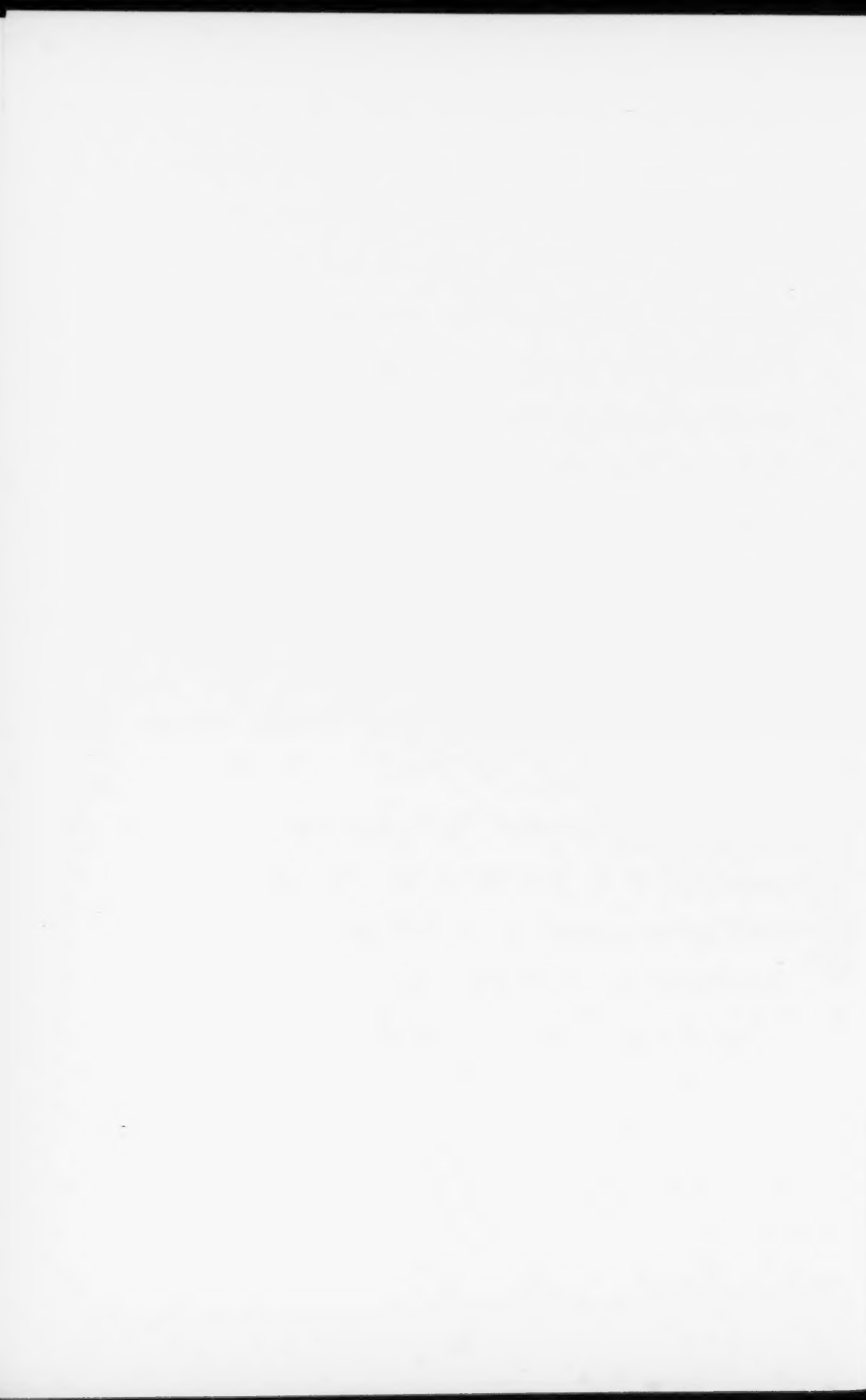
Thompson also memorialized her version of



the events. On June 20, 1983 Thompson received her last performance evaluation, which carried a rating of unsatisfactory. Thompson refused to sign it and requested an impartial review of her performance evaluation. Later, in June 1983 Sweeney acted as an impartial reviewer, who after asking Thompson specific questions about her duties, such as how to operate the computer, for which Thompson had been refused the training she had requested, concluded that she could not adequately perform her duties and therefore the unsatisfactory rating should stand.

On July 25, 1983, Thompson was officially informed that she would be terminated effective August 5, 1983 because of discourteous treatment to Maury.

On August 2, 1983, Thompson's union presented a grievance on her behalf. The grievance was processed through three of the four levels specified in the Collective

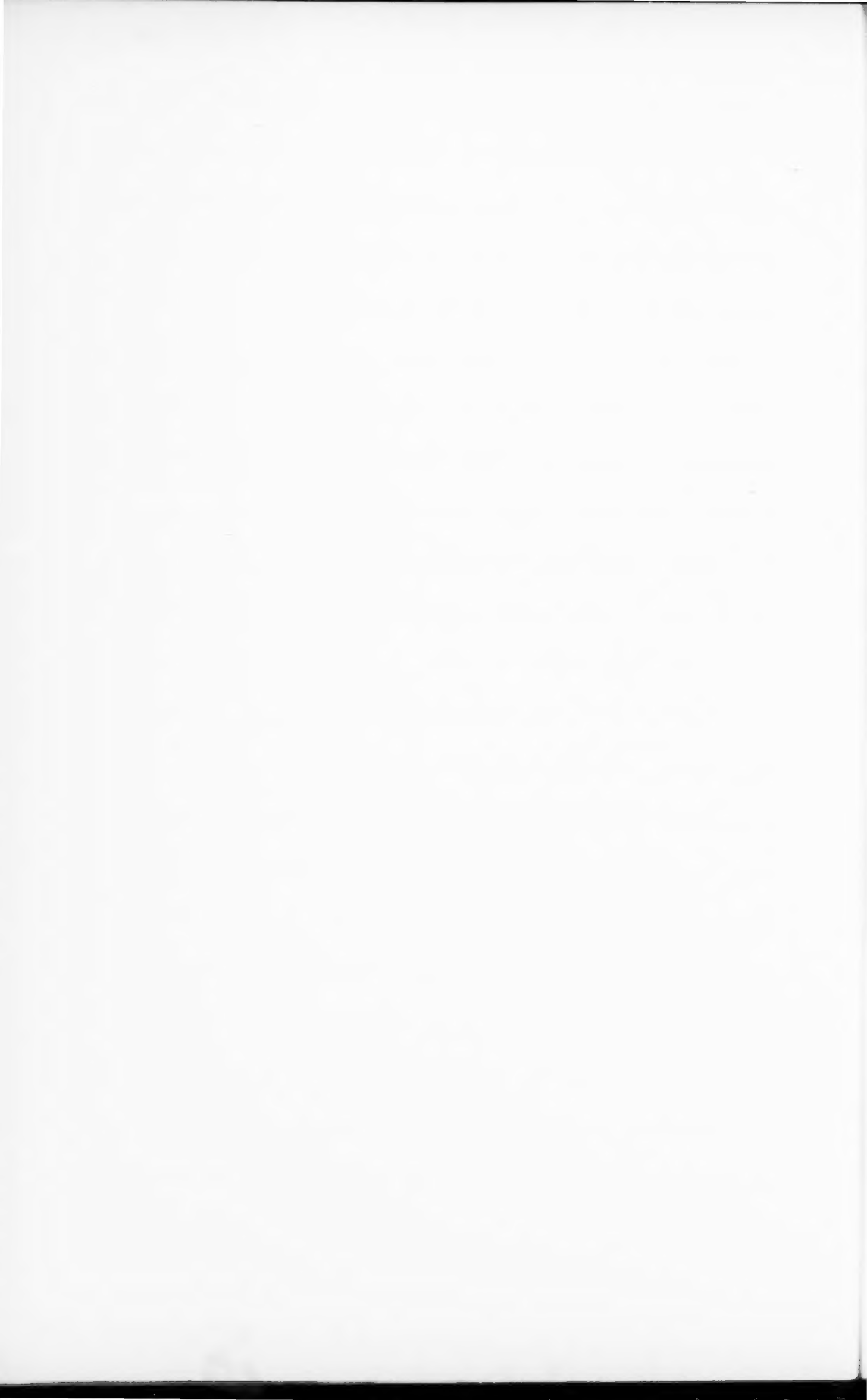


Bargaining Agreement and on September 15, 1983 a decision was issued upholding Thompson's termination. As the union declined to invoke arbitration the administrative process was concluded. Thompson filed suit.

The trial, lasting four weeks, concluded on June 12, 1986, with a jury verdict jointly and severally against the District of Columbia and Maury, in the total amount of \$385,030.00. The jury awarded Thompson \$530.00 for the tort of assault and battery; \$35,000.00 for the tort of defamation; \$42,000.00 for the tort of intentional infliction of emotional distress; and \$280,000.00 for diminished earning capacity resulting either from the defamation, the intentional infliction of emotional distress or both.

The jury found against Maury on his counterclaim of assault and battery.

The sole issue before the Court in this proceeding is whether employees of the District of Columbia may bring common law



actions to recover damages based on personnel actions either required or authorized by the Comprehensive Merit Personnel Act as was the holding in Thompson I or whether such actions can be judicially determined to be preempted by the Act, absent any statutory language, as determined in Thompson II.

WRIT OF CERTIORARI SHOULD ISSUE
TO PROVIDE TO THE PETITIONER
HER RIGHT TO BRING A COMMON LAW
ACTION IN TORT

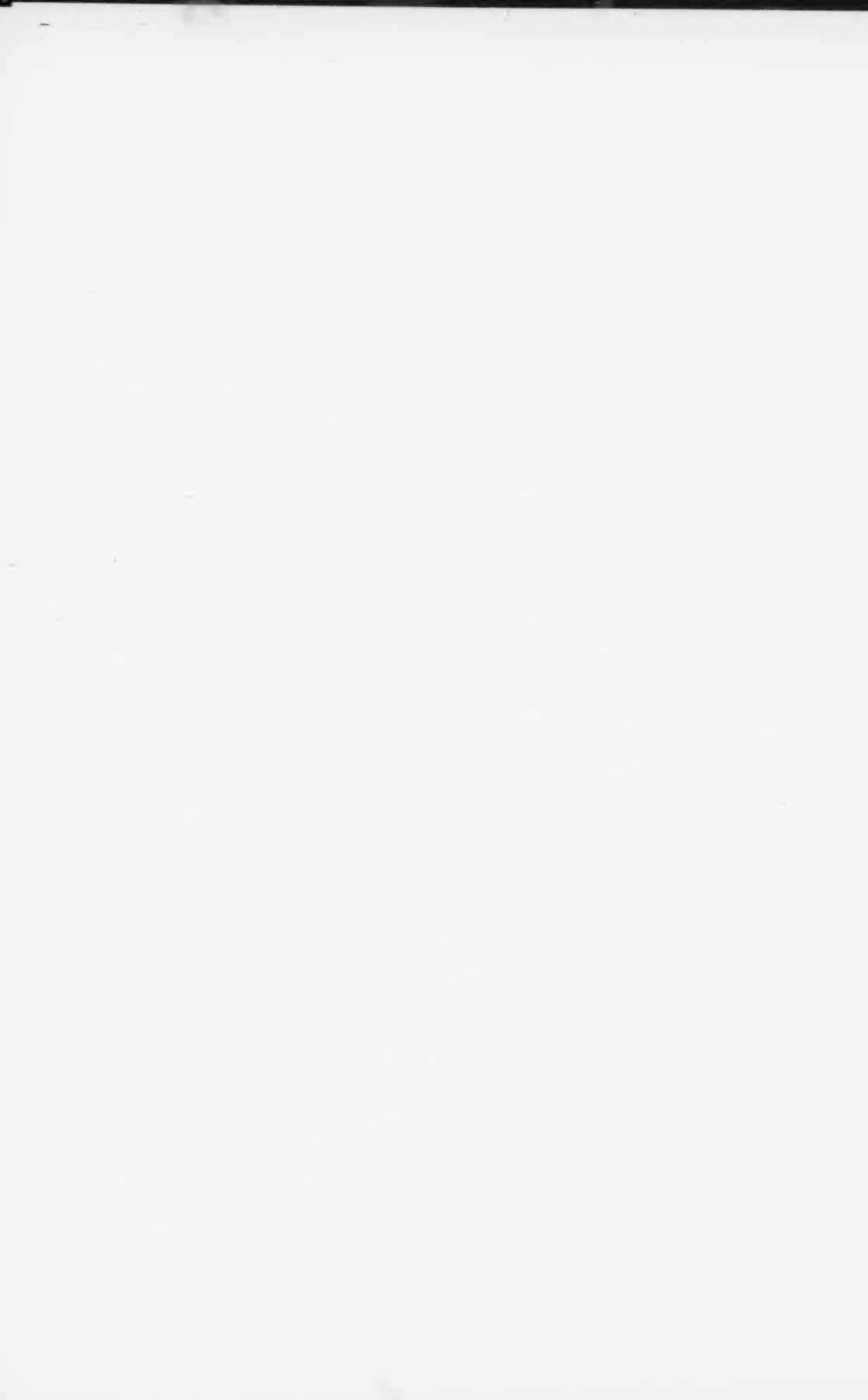
A. This Court Should Hold That The Provisions Of The Comprehensive Merit Personnel Act Do Not Preclude Common Law Claims Against Supervisors And The District of Columbia.

As noted in the dissent in Thompson II the



Court of Appeals conceded that there is not a word in the text of the CMPA or in its legislative history to the effect that the Act's remedies, including common law judicial remedies are to be abolished. Nevertheless, the majority in its decision destroyed these common law rights and attempts, through judicial fiat to accomplish that which the Council for the District of Columbia did not.

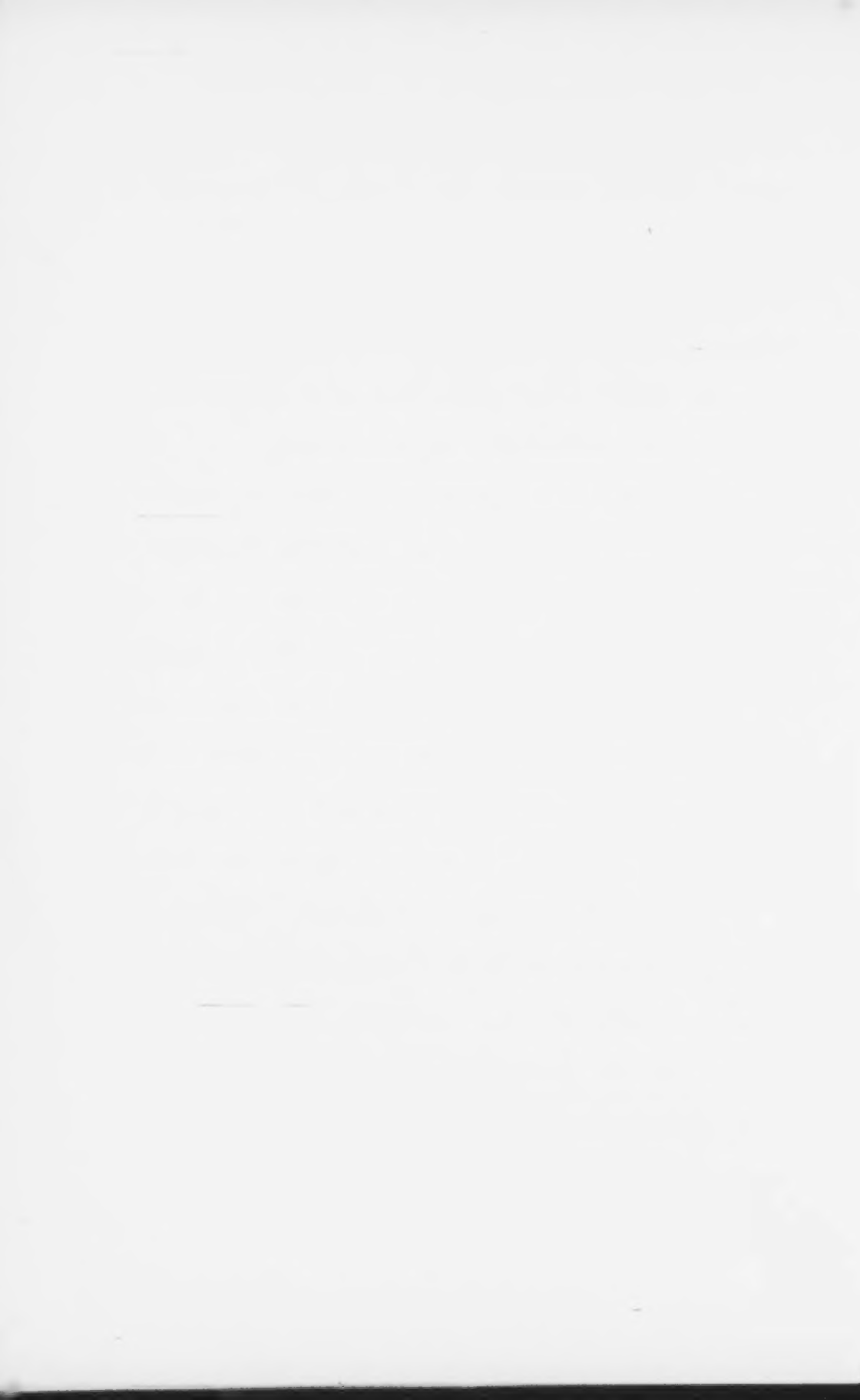
When the terms of a statute are unambiguous, the inquiry comes to an end, except in rare and exceptional circumstances. TVA v. Hill, 437 U.S. 153, 187, n.33, 98 S. Ct. 2279, 2298, n. 33, 57 L. Ed. 2d 117 (1978). As there are no rare and exceptional circumstances presented here, the rule of statutory construction that a clear and -specific legislative intent is required to override the common law is controlling. The District of Columbia Council has not spoken in the unmuted strains necessary to displace the common law.



A. The Plain Language of the Statute
Enacted by the Council Does Not Support The
Repeal of the Common Law Right of Action.

In Norfolk R & H Auth. v. Chesapeake & Potomac Tel., 104 S. Ct. 304, 307 (1983) the Supreme Court held that "it is a well-established principle of statutory construction that the common law ... ought not to be deemed repealed, unless the language of the statute be clear and explicit for this purpose." Citing Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603, 623, 3 L.Ed. 453 (1813).

As already stated the statute contains no such clear or explicit language abolishing the common law right of action. When the District of Columbia was granted Home Rule, under the District of Columbia Self-Government Act, D.C. Code § 1-201 et seq. (1981), the District was delegated the power to develop its own comprehensive personnel system to replace the federal system which controlled.



The District followed the mandate and developed a merit personnel system independent of the federal system. The District of Columbia Court of Appeals recognized this independence and refused to hold that certain provisions of the CMPA require a carbon copy of the totality of the federal process, stating that to do so would render inert the mandate of the Self-Government Act. American Federation of Government Employees v. Barry, 459 A. 2d 1045, 1051 (D.C. App. 1983). That the federal system does not allow common law rights of action does not by implication compel a similar reading of District law.

The District of Columbia Court of Appeals not only violated its standards of statutory construction but transcended its role and assumed the functions of the legislative branch in creating new law.

The Court of Appeals has long recognized that "the primary and general rule of statutory construction is that the intent of



the lawmaker is to be found in the language that he has used," Varela v. Hi-Lo Powered Stirrups, Inc., 424 A. 2d 61, 64 (D.C. 1980) (en banc) (quoting United States v. Goldenberg, 168 U.S. 95, 102-03, 18 S. Ct. 3, 4, 42 L. Ed. 394 (1897), and that the "words of the statute should be construed according to their ordinary sense and with the meaning commonly attribute to them." United States v. Thompson, 347 A. 2d 581, 583 (D.C. 1975).

As the court conceded that there is no specific limiting language regarding the abolition of the common law right to bring an action in tort, deference to the courts analysis is accorded. However, this Court as well as the Court of Appeals, has recognized that "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination." Harrison v. Northern Trust Co., 317 U.S. 476, 63 S. Ct.



361, 87 L. Ed. 407 (1943); Sanker v. United States, 374 A. 2d. 304, 307 (1977) (quoting Lynch v. Overholser, 369 U.S. 750, 710, 82 S. Ct. 1063, 1067, 8 L. Ed. 2d 211 (1962)).

B. The Legislative History of the Enactment of the CMPA Does Not Specifically Deal With the Repeal of a Common Law Right of Action Nor Does it Specifically Make Administrative Remedies Exclusive.

Applying the plain meaning rule is the first step of statutory interpretation, however, a review of the legislative history or in depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve. Such is not the case here.

When a court is called upon to interpret a statute its primary task is to be consistent with the legislative intent. See Nova



University v. Educational Inst.. Licensure Comm'n, 483 A. 2d 1172, 1179-80 (D.C. 1984) cert. denied, 470 U.S. 1054, 105 S. Ct. 1759, 84 L. Ed. 822 (1985); District of Columbia National Bank v. District of Columbia, 121 U.S. App. D.C. 196, 198, 384 F. 2d 808, 810 (1965). In this case the Council of the District of Columbia knew how to make administrative remedies exclusive. It could have preempted common law remedies if had specifically chosen to do so.

In Thompson II the Court of Appeals, citing Monroe v. Foreman, 540 A. 2d 736, 739 (D.C. App. 1988), states that "the venerable cannon that would have us strictly construe a statute against altering the common law creates a rebuttable presumption," holding that the No-Fault Act was so construed. However, the court in Monroe held that "no statue is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the



common law which it does not fairly express."
Dell v. Department of Employment Services, 499
A. 2d 102,107 (D.C. 1985) (quoting Shaw v.
Railroad Co., 101 U.S. (11 Otto) 557, 565, 25
L. Ed. 892 (1880).

C. Other District Legislation Has
Specifically Exempted Common Law Rights of
Action Creating the Presumption That Had the
Council So Desired It Would Have Done So In
the CMPA.

Under the No-Fault Act the statute
specifically excluded a right of action. The
court in Monroe held that "the rule that
statutes in derogation of the common law are
to be strictly construed does not require such
an adherence to the letter as would defeat an
obvious legislative purpose or lessen the
scope plainly intended to be given the
measure." Jamison v. Encarnacion,, 281 U.S.
635, 640, 50 S. Ct. 440, 442, 74 L. Ed. 1082



(1930). Similarly, the common law right to institute a tort action, in workers compensation cases, has been statutorily restricted. Treadway v. District of Columbia, 403 A.2d 732 (D.C.) cert. denied, 444 U.S. 867, 100 S. Ct. 141, 62 L. Ed. 2d 92 (1979).

The Council for the District of Columbia knew how to make administrative remedies exclusive. Indeed it included exclusionary language in one part of the CMPA but excluded it from another part.

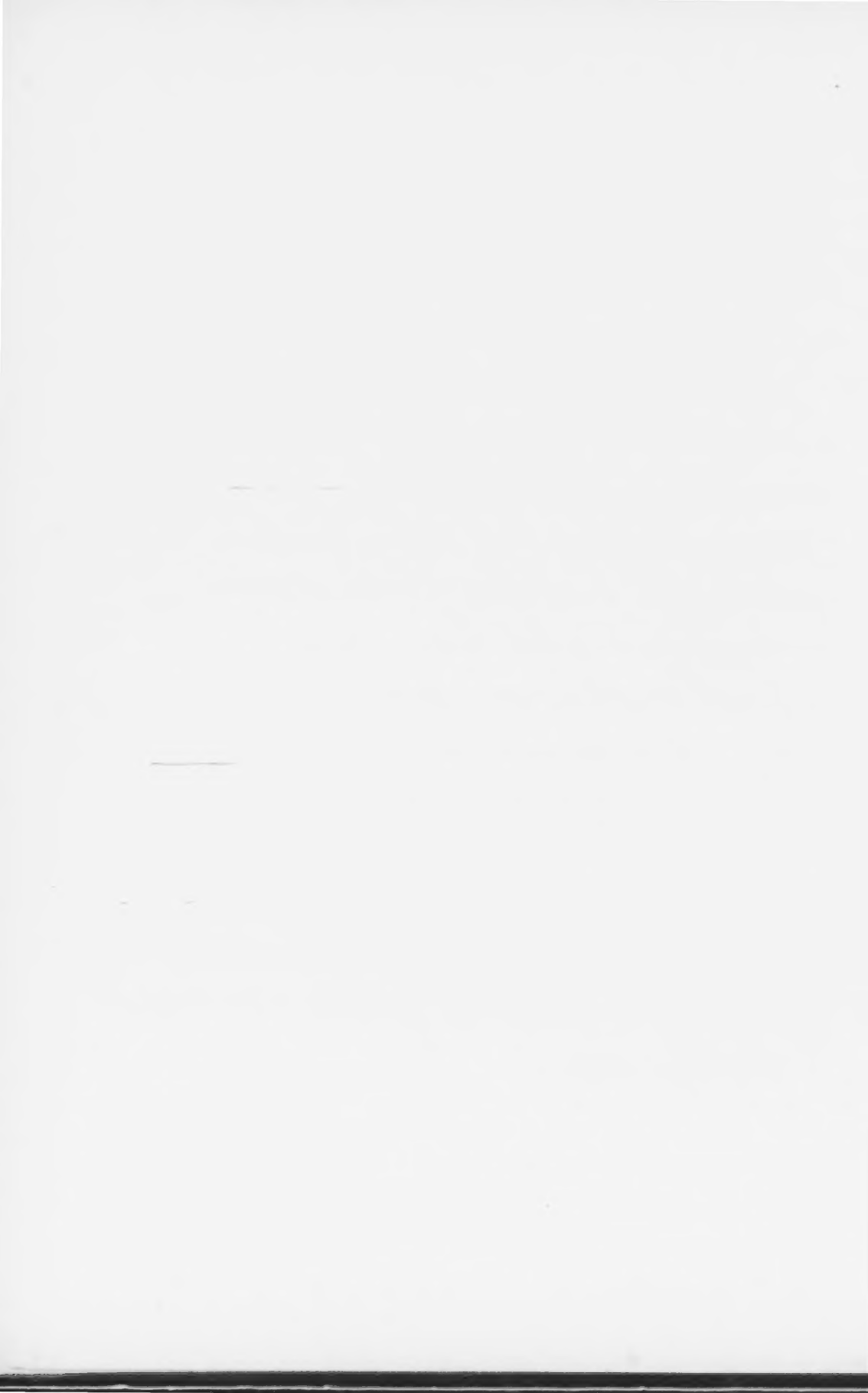
When interpreting any portion of an act, the statutory meaning of a term should be considered in the context of the entire legislative scheme, Howard v. Riggs National Bank, 432 A. 2d 701, 709 (D.C. App. 1981); In re T.L.J., 413 A. 2d 154, 158 (D.C. App. 1980); United Mine Workers of America v. Andrus, 189 U.S. App. D.C. 110, 114, 581 F. 2d 888, 892, cert. denied, 439 U.S. 928, 99 S. Ct. 313, 58 L.Ed. 2d 321 (1978). Moreover, the meaning of a term or phrase must be

"derived not from the reading of a single sentence or section, but from consideration of the entire enactment against the backdrop of its policies and objectives." Don't Tear It Down v. Pennsylvania Ave. Dev. Corp., 206 U.S. App. D.C. 122, 128, 642 F. 2d 527, 533 (1980).

The Appeals Court's analysis, in Thompson II, in this regard is woefully inadequate and concludes with the judgment that the Council "'plainly intended' the CMPA to create a mechanism for addressing virtually every conceivable personnel issue... with a reviewing role for the courts as a last resort, not a supplementary role for the courts as an alternative forum."

D. The Council Acted Intentionally and Purposely As the Existence of the Right Was Not At Odds With District Law Nor In Conflict With Federal Law.

It is well settled that repeals by



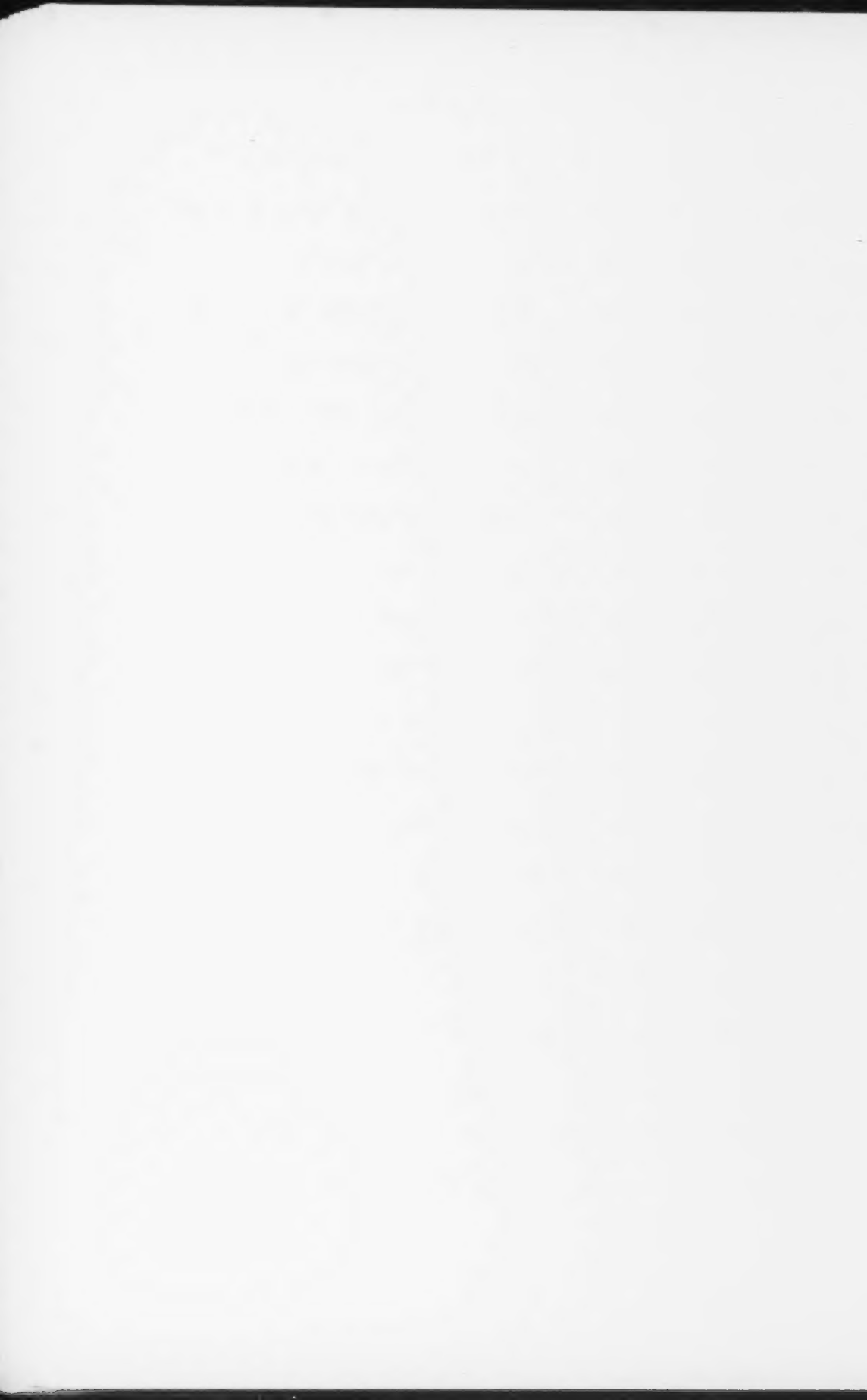
implication are not favored, Rodriquez v. U.S. 480 U.S. 522, 94 L. Ed. 5333, 107 S. Ct. 1391 (1987), and will not be found unless an intent to repeal is "clear and manifest." United States v. Borden Co., 308 U.S. 188, 198, 60 S. Ct. 182, 188, 84 L. Ed. 181 (1939) (quoting Red Rock v. Henry, 106 U.S. 596, 602, 1 S. Ct. 434, 439, 27 L. Ed. 251 (1883)). Nothing in the CMPA suggests the existence of an irreconcilable conflict with maintaining a mechanism for employee grievances and allowing an employee to bring an action in tort.

This Court, in Russello v. United States, 464 U. S. 16, 23, 104 S. Ct. 296, 300, 78 L. Ed. 17 (1983) (quoting United States v. Wong Kim Bo, 472 F. 2d 720 722 (CA5 1972), stated "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Similarly, the



Council of the District of Columbia is presumed to have acted intentionally and purposely, with full awareness of the trends in the federal system, when it skillfully crafted the CMPA to address unique concerns.

The Court of Appeals was persuaded by the District's argument analogizing the CMPA to federal legislation, notably the federal Civil Service Reform Act (CSRA). However, deciding what aspects of the federal system are to be retained and which will be sacrificed to the achievement of a particular objective is the very essence of legislative choice. And it frustrates rather than effectuates legislative intent to assume, simplistically, that because the federal system precludes such actions then by analogy the District CMPA does, or must, exclude such rights of action. In this situation the language in question is sufficiently clear in its context, is not at odds with the legislative history, and is not in conflict or collision with federal



statutory policy, thereby making it difficult to understand the court's rationale for abolishing this avenue of relief.

E. The Appellate Court's Decision
Constitutes Judicial Legislation.

The District has argued that the common law right of action should be abolished as the costs associated with such actions are substantial while the Court of Appeals concludes that the Act needs improvement. Combined, the Executive and Judicial branches of the District of Columbia have determined that they can effect the necessary legislative remedy. This judicial legislation destroying common law rights by judicial fiat is being used to seek dismissal of all cases where D.C. employees have sued in tort situations of this kind.

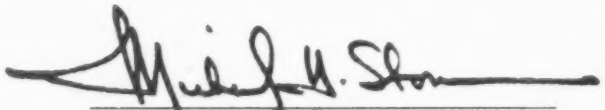
**F. Summary: The Abolition of a Common
Law Right of Action by Judicial Fiat is Beyond
the Scope of the Court of Appeals.**

The CMPA is a comprehensive piece of legislation which was enacted after exhaustive debate. The legislative process is now jeopardized by the court's judicial activism. The District of Columbia reversed its strong tradition of analysis in this case to accomplish that which only the legislature is empowered to undertake.



CONCLUSION

For the foregoing reasons, the petitioner asks that a petition for certiorari issue to the District of Columbia Court of Appeals to consider its judgment and order reversing the jury award to the petitioner on her claims.



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DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 86-1051 & 86-1681

District of Columbia

and

Alfred Maury, Appellants,

v.

Patricia Joan Thompson, Appellee.

(Hon. William S. Thompson, Trial Judge)

On Petition for Rehearing

(Argued December 5, 1990)

(Decided June 17, 1991)

Donna M. Murasky, Assistant
Corporation Counsel, with whom Herbert O.
Reid, Sr., Corporation Counsel at the
time the brief was filed, and Charles L.
Reischel, Deputy Corporation Counsel,
were on the brief, for appellants.

Joseph P. Hart for appellee.



Before Ferren and Schwelb, Associate Judges, and Belson*, Associate Judge, Retired.

Opinion for the court by Associate Judge Ferren.

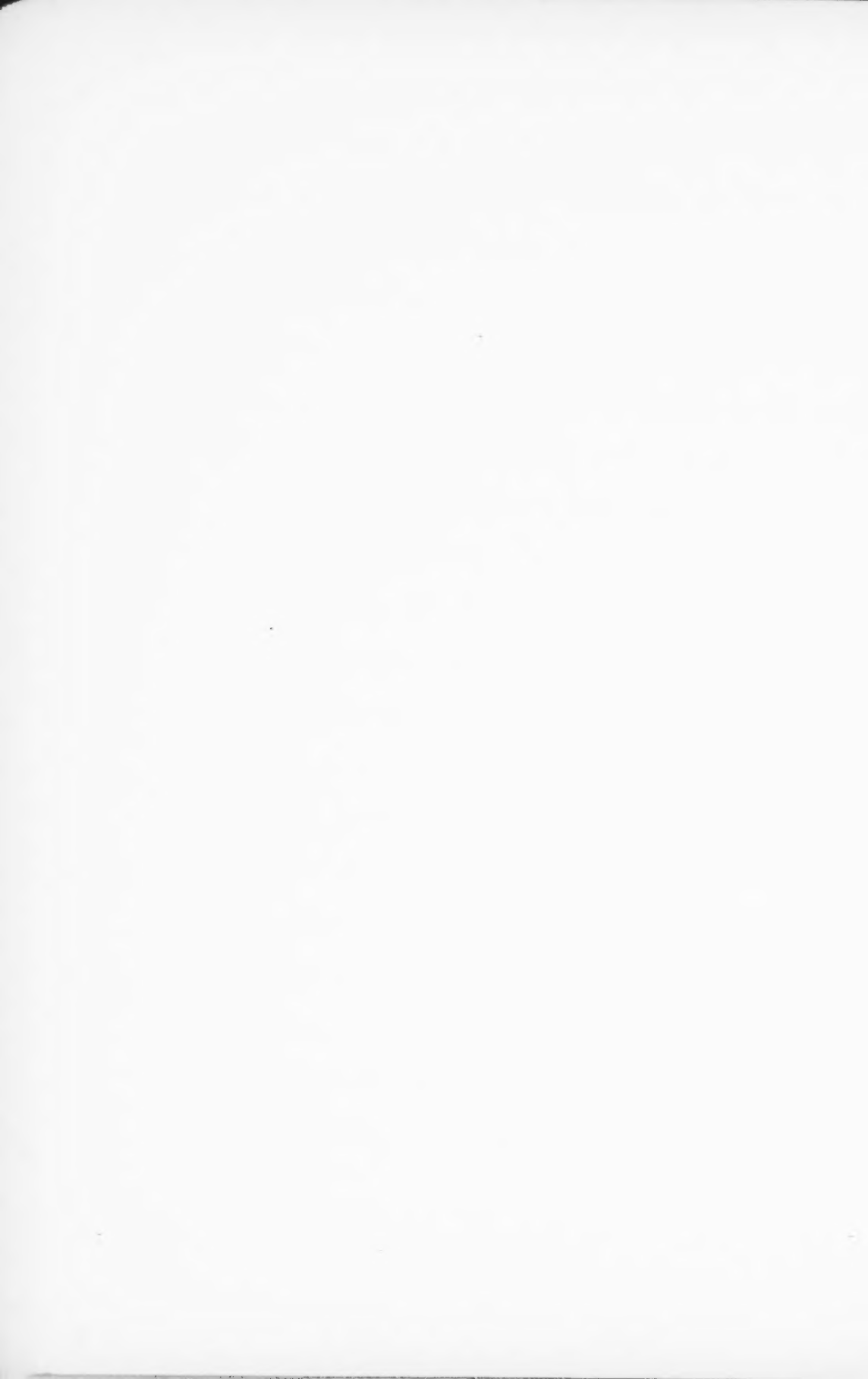
Dissenting opinion by Associate Judge Schwelb at p. 34.

Ferren, Associate Judge: Appellant Patricia Thompson, an employee of the Northeast branch of the District of Columbia Public Library, sued the District and her supervisor, Alfred Maury, for intentional infliction of emotional distress, defamation, and assault and battery. On February 12, 1990, this division of the court held, in Part II of our opinion, that Thompson's claims against the District presented a

* Judge Belson was an Associate Judge of the court at the time of argument. He became an Associate Judge, Retired, effective June 1, 1991.

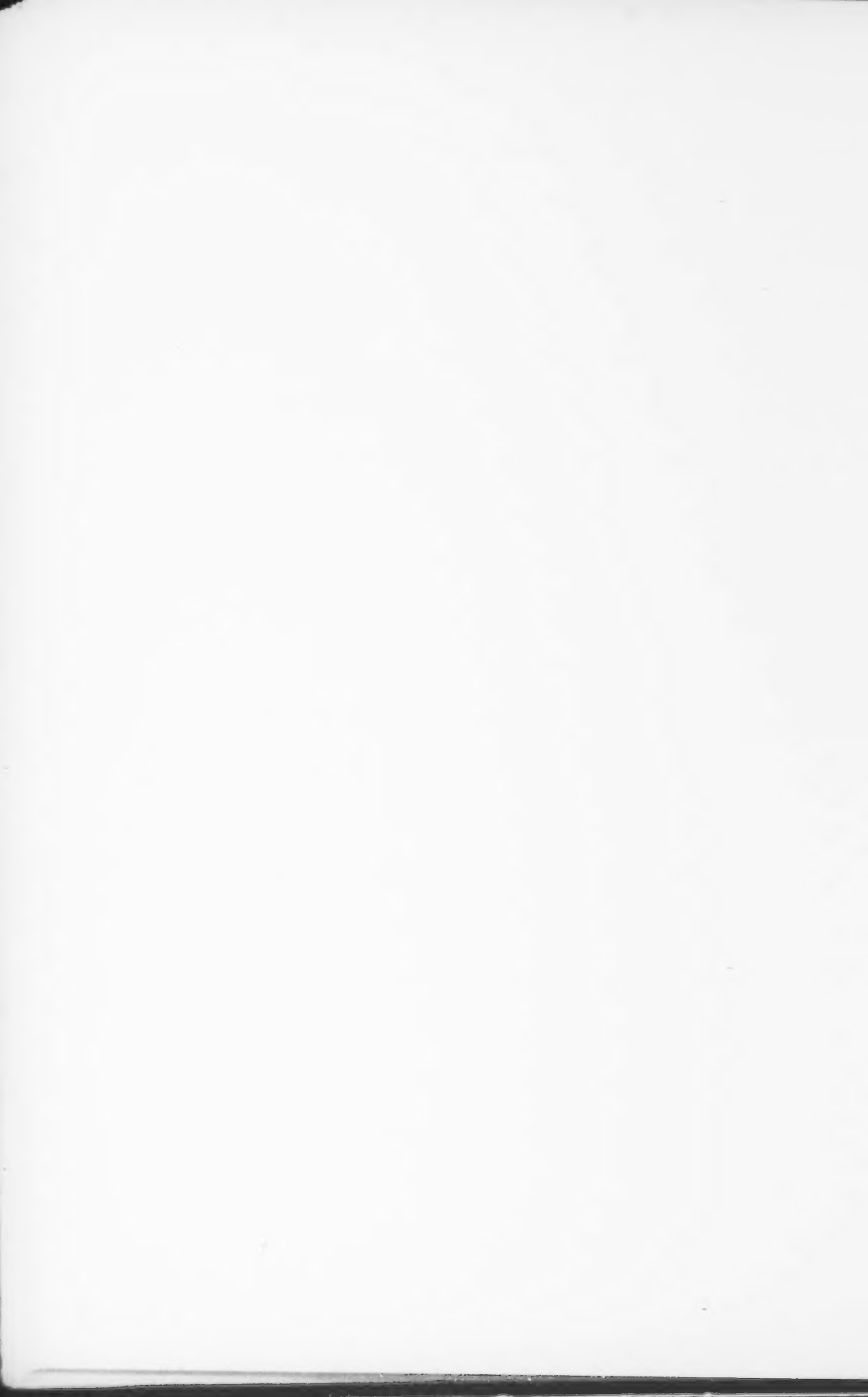


"substantial question" whether all her alleged injuries--mental and emotional, as well as physical--were covered under the disability compensation provisions of the District's Comprehensive Merit Personnel Act (CMPA), D.C.Code §§ 1-624.2 to -624.46 (1987). District of Columbia v. Thompson, 570 A.2d 277, 287, 288 (D.C. 1990). These CMPA sections contain an exclusivity provision, D.C. Code § 1-624.16(c), see infra note 16, which, if applicable, would preclude Thompson's common law claims against the District. We concluded that if the disability provisions did cover these claims, Thompson could seek compensation from the District only through an administrative proceeding before the Department of Employment Services (DOES). Id. at 288. We therefore remanded to the trial court with directions to stay the proceeding



against the District of Columbia until Thompson had had a reasonable time to test the reach of CMPA by filing with DOES for disability benefits. Id. at 288, 300-301.

In part III of the opinion we considered the District's alternative argument. We held that, in possible contrast with CMPA's disability provisions, CMPA's comprehensive personnel evaluation provisions--more specifically, those in Subchapter 15 governing employee "performance ratings", D.C. Code §§ 1-615.1 to -615.5 (1987), and those in Subchapter 17 covering "adverse actions" and "grievances," id. §§ 1-617.1 to -617.3 -- did not preempt Thompson's right to bring common law tort actions against the District and Maury. Thompson, 570 A.2d at 289. Nor did these CMPA provisions require exhaustion of

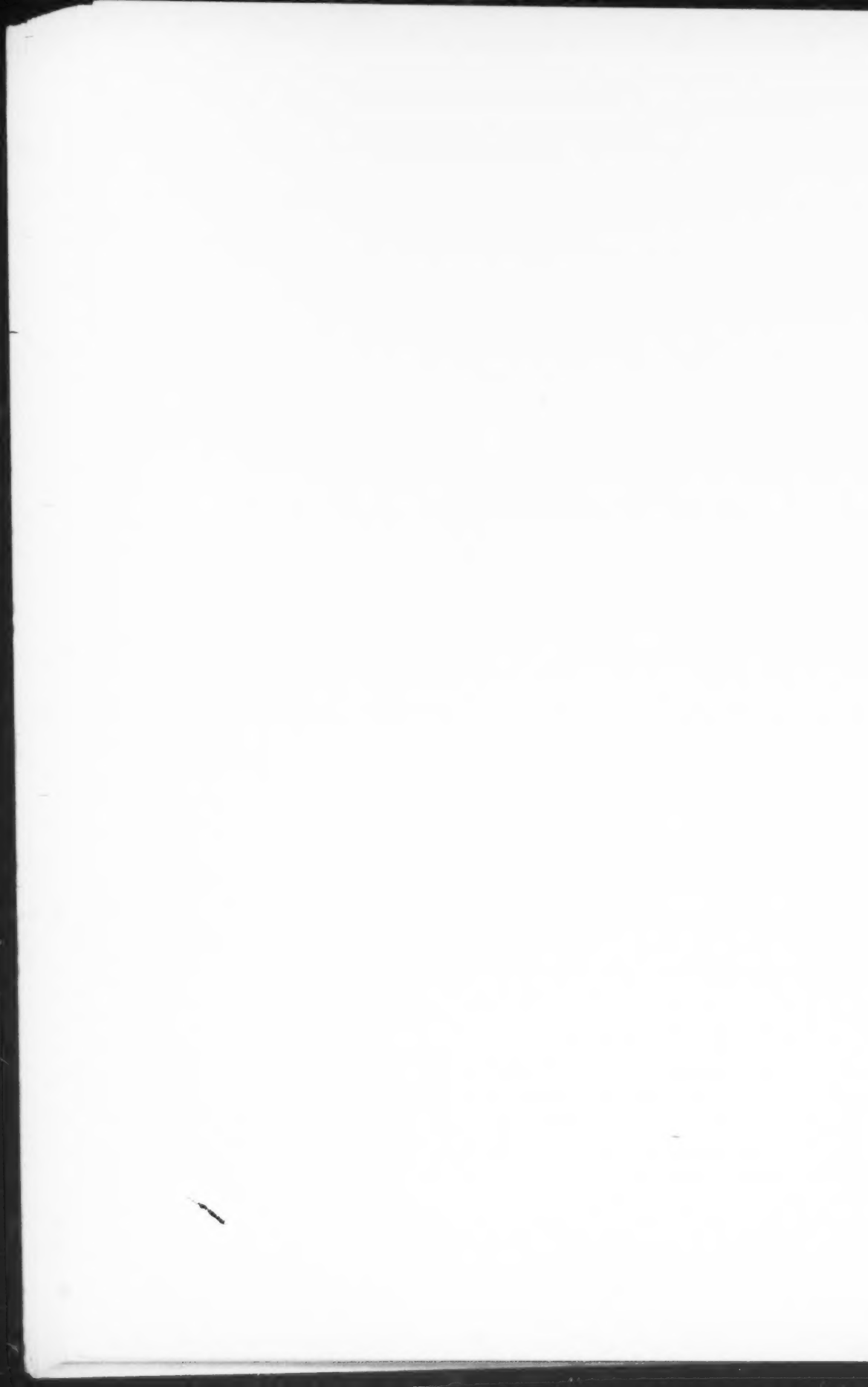


administrative remedies. Id. Therefore, had we not decided to stay the proceeding against the District because of possible preemption by the CMPA disability provisions, we would have found no other CMPA bar to reaching the merits of the common law claims against the District. Furthermore, because we perceived no CMPA bar against Thompson's suit against Maury, id. at 288 & n.7, we reached the merits on those claims. In doing so, we dismissed the claim for intentional infliction of emotional distress (Part IV), id. at 291, 300, and reversed and remanded for a new trial the claims for defamation (Part V), id. at 291-298, 301, and for assault and batter (Part VI), id. at 298-300, 301. We recognized, moreover, that if DOES were to rule that Thompson's claims against the District were not governed by CMPA's disability

provisions, our rulings on defamation and assault and battery applicable to Maury would be available to Thompson in renewed trial court proceedings seeking derivative liability against the District. Id. at 288, 301.

After issuance of our first opinion and order, the District and Maury petitioned for rehearing.¹ We granted the petition, without vacating our opinion and order, primarily to give further consideration to Part III (and, consequently, to Parts IV, V, and VI) of that opinion. Accordingly, we have focused once again on the District's alternative argument under CMPA: that the comprehensive statutory provisions covering employee "performance ratings"

¹Because the District filed its petition for rehearing on behalf of both Maury and the District, all arguments which we label the "District's" extend to both appellants.



(Subchapter 15) and "adverse actions" and "grievances" (Subchapter 17) provide exclusive remedies for employee claims arising out of the kinds of employer activities--performance evaluation and discipline--identified in those subchapters. In short, we reconsider whether those CMPA provisions preempt, and thus preclude court action against the District and Maury on, Thompson's claims of defamation and of intentional infliction of emotional distress arising out of the employment relationship.² We are now persuaded by the preemption argument. Accordingly, while we reaffirm several parts of our earlier opinion--the introduction (except for the last two,

²The District concedes that Thompson's assault and battery claims against Maury and the District are not properly characterized as actions covered by CMPA Subchapters 15 and 17 and thus are properly brought in court as independent tort actions.



dispositional sentences), Part I (facts and proceedings), Part II (CMPA disability provisions), and Part VII (reassignment to different trial judge)-- we vacate Parts III, IV, V,³ and VIII (summary of disposition) and modify Part VI to delete reference to the defamation claim.

I.

A.

A. jury awarded Thompson damages of \$530 for assault and battery, \$35,000 for defamation, \$42,500 for intentional infliction of emotional distress, and \$280,000 for loss of wages or diminished earning capacity attributable either to the defamation or to the intentional infliction of emotional distress.

³In Moss v. Stockard, 580 A.2d 1011, 1013, 1018 & n.12, 1020-1022 (D.C. 1990), this court incorporated and relied on our analysis in Part V of our earlier opinion. That analysis accordingly survives.



Thompson, 570 A.2d at 280. Thompson's defamation and emotional distress claims are based on twenty-two memoranda that her supervisor, appellant Maury, had written during Thompson's two-year employment beginning in May 1981 as a library technician at the Northeast branch of the District's Public Library. As we noted in our earlier opinion:

These memoranda, beginning in June 1981, repeatedly advised and warned [Thompson] to follow the correct leave request procedures and notified her of problems in the performance of her duties, including conflicts with a summer employee, inaccuracy in putting information into the computer, and insubordination and rudeness to staff and patrons. Thompson claimed that all these memoranda were false,



that they defamed her, and that, by writing the memoranda and harassing her, Maury intentionally had inflicted emotional distress.

Thompson testified that some of the memoranda blamed her for not doing tasks when she either had been told not to do them or had been asked to do other work. Thompson also testified that some of the memoranda either mischaracterized her disputes with Maury or were absolutely false. She felt some of the other memoranda were excessively critical, and she said they contained complaints that Maury had not told her in person.

Id. at 281. Thompson's emotional distress claim also rests on the following actions:

[Maury] approved her leave and then changed her status to absence



without leave; he refused to consider her for promotion to the next grade level or to give her the computer test she asked for; he isolated her from the other employees; he requested statements from her doctor as to her limited hours; he wrote memoranda on her excessive leave; and he assaulted her and lied about it, resulting in her job loss.⁴

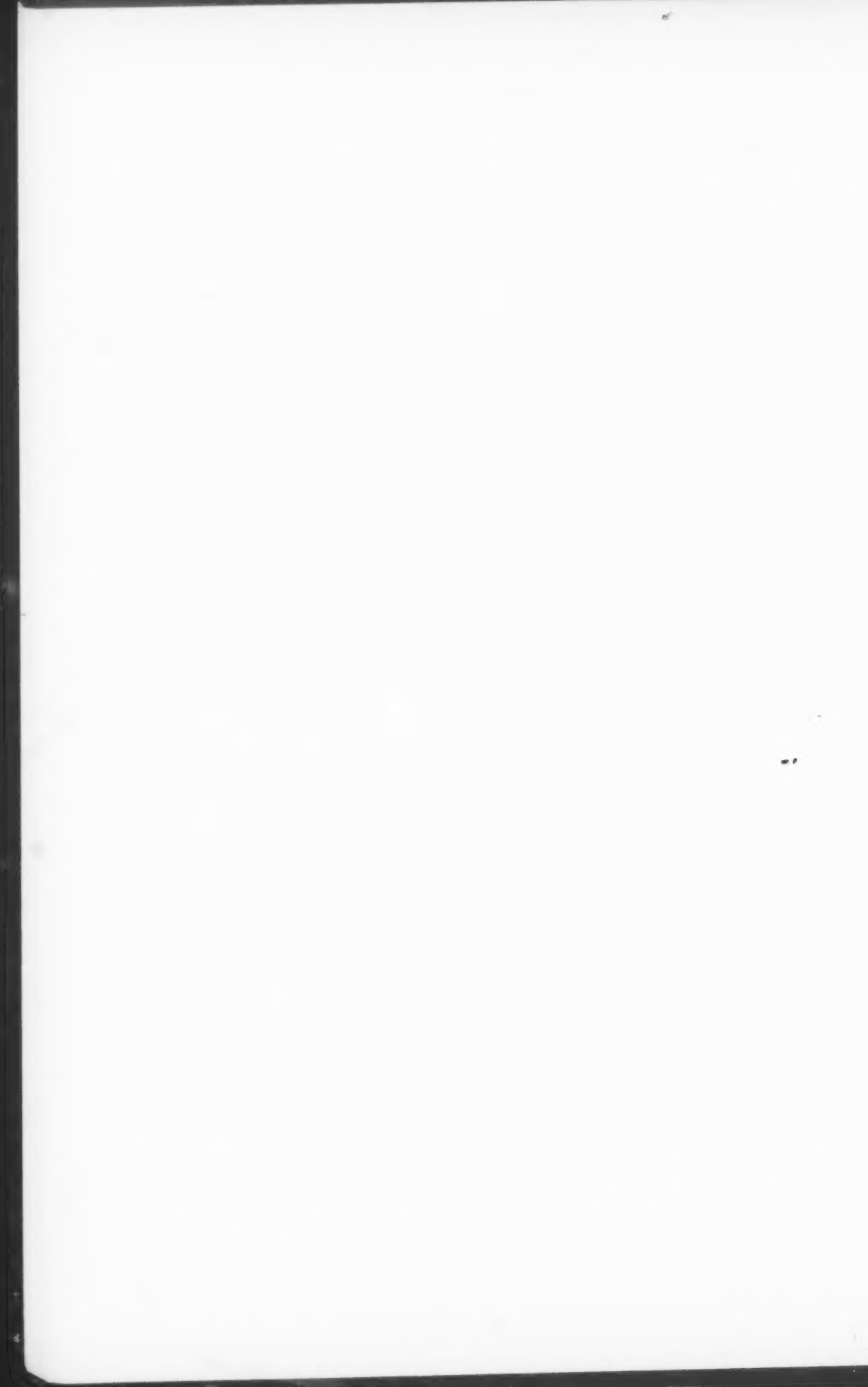
Id. at 290.

B.

Before addressing Maury's memoranda and other alleged tortious conduct, we

⁴Thompson received a proposed notice of discharge for cause on June 22, 1983. The notice stated the reason for her termination was "Discourteous Treatment of your Supervisor." Thompson, 570 A.2d at 284. Subchapter 17 of CMPA, D.C. Code § 1-617.1(d), permits dismissal for "cause" based (among other things) on: "(11) Discourteous treatment of the public, supervisor, or other employees[.]"

believe it would be helpful to outline the statutory scheme that, according to the District, provides the exclusive route to resolving Thompson's claims. CMPA establishes a merit personnel system that, among other things, provides for (1) employee "performance ratings," including "corrective actions" when necessary; (2) employee discipline through "adverse action" proceedings; and (3) prompt handling of employee "grievances." See D.C. Code §§ 1-615.1 to -615.5 and 1-617.1 to -617.3. As a general rule, whether a public employee defends a corrective or adverse action by the employer, or initiates a grievance proceeding against the employer, the matter will be resolved either under detailed CMPA procedures or under a CMPA-sanctioned collective bargaining agreement between the employing agency



and a public employees' labor union--but not both. See id §§ 1-615.3(c), -615.4(d), -617.3(d).

More specifically, subchapter 15 of CMPA, D.C. Code §§ 1-615.1 to -615.5, requires the Mayor, "after negotiation with appropriate labor organizations," to establish a "performance-rating plan" for evaluating all covered personnel. Id. § 1-615.1. The plan, at a minimum, must provide for annual performance ratings "used to improve employee performance" Id. § 1-615.2. Employees shall be rated according to at least a five-level scale from "outstanding" to "unsatisfactory;" "may be rated unsatisfactory only after a 90-day advance warning period;" and may be removed only by the "adverse action" procedures outlined in Subchapter 17 of CMPA, D.C. Code §§ 1-617.1 to -617.3, "unless otherwise provided by a

negotiated contract" with a public employees labor union. Id. § 1-615.3.

An employee may obtain an impartial review of a performance rating by the board of review within his or her own particular agency, subject to further review by the Office of Employee Appeals (OEA), id. §§ 1-606.3(a), -615.4, and by the Superior Court. Id. § 1-606.3(d). Employees covered by a collective bargaining agreement, however, may be subject to performance rating plans and review procedures that differ from those provided under CMPA itself. See id. §§ 1-615.4(d), -615.5.⁵

⁵For instance, employees covered by a collective bargaining agreement might not have the option of seeking review of an adverse action before the Office of Employee Appeals (OEA). The OEA's regulations recognize that it lacks jurisdiction (1) when a collective bargaining agreement "provides exclusive negotiated procedures for adverse action, performance ratings, grievances or reduction-in-force review," and (2) when a collective bargaining agreement permits

In Subchapter 17, CMPA establishes procedures for processing employee "grievances."⁶ Id. § 1-617.2. "The grievance system shall provide for the expeditious adjustment of grievances and complaints and the prompt taking of appropriate corrective action when the complaint or grievance is, upon review, found to be justified." Id. Subchapter 17 also governs "adverse actions," such as removal for cause. Id. §§ 1-617.1, - 617.3. When confronted by an adverse action, an employee is entitled to receive a written copy of the charges, to

an employee to choose between the statutory and negotiated review procedures and an employee opts to use the negotiated procedures. OEA Proposed Regulations § 601.2, 27 D.C. Reg. 4350, adopted as final, 27 D.C. Reg. 5449 (1980).

⁶CMPA broadly defines a grievance as "any matter under the control of the District government which impairs or adversely affects the interest, concern, or welfare of employees." D.C. Code § 1-603.1(10).

have time to file a written answer, and to receive a decision "within 45 calendar days of the date that charges are preferred." Id. § 1-617.3(a)(1))(D).

The employee may appeal any adverse action or decision on any employee-initiated grievance to OEA, with the right of judicial review in Superior Court. Id. §§ 1-606.3(a) and (d), - 606.4(e), -617.3(b); see Stokes v. District of Columbia, 502 A.2d 1006, 1011 (d.C. 1985) (affirming Superior Court reversal of OEA's order reinstating electrical foreman at juvenile correctional institution). However, as in the case of performance rating review, "[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over"



Subchapter 17 procedures, including OEA review. D.C. Code § 1-617.3(d).⁷

If an employee grievance goes to arbitration pursuant to a collective bargaining agreement, the union and the employee may appeal the arbitration award to the Public Employee Relations Board (PERB), subject to judicial review in Superior Court. Id. §§ 1-605.2 (6) and (12). Employees dissatisfied with their union's representation may appeal to

⁷Any employee normally represented by a union may, nonetheless, elect to present a grievance to the employer at any time without the intervention of the labor organization--provided the union is given an opportunity to be present and to offer its views--but "adjustments of grievances must be consistent with the terms of the applicable collective bargaining agreement." D.C. Code § 1-618.6(b). We know from OEA Regulations that once an employee who is covered by a collective bargaining agreement that permits an employee to choose between statutory and negotiated procedures elects to use the negotiated procedures, he or she may not use CMPA's employee-initiated procedures to appeal that matter to OEA. See supra note 5.



PERB, and then seek judicial review in Superior Court, if they have a basis for alleging improper conduct. See id. §§ 1-605.2(3), -605.2(9), -605.2(12); Hawkins v. Hall, 537 A.2d 571, 574 (D.C. 1988) (Board of Education employees who claimed Board and union unlawfully withheld union dues from their wages required to exhaust administrative remedies at PERB before seeking judicial relief); Fraternal Order of Police v. Public Employee Relations Bd., 516 A.2d 501, 504 (D.C. 1986) (upholding trial court order affirming PERB decision that union improperly rescinded agreement to pay member's outside counsel fees).

C.

Thompson was a member of the Public Library employees' exclusive bargaining agent, The American Federation of State, County and Municipal Employees, AFL-CIO



(AFSCME). Although her claims for defamation and emotional distress, therefore, must be tested by reference to the Library's contract with AFSCME, the applicable principles of preemption--of exclusiveness of remedy--are the same whether an employee's rights and obligations are governed by a collective bargaining agreement or by the provisions of CMPA itself. We say this because CMPA and a CMPA-sanctioned union contract are alternative governing documents generally covering the same scope of employer-employee rights and duties. We therefore consider, next, how the CMPA scheme and Thompson's claims intersect. We discuss not only how the union contract applies but also how the CMPA provisions themselves would apply (absent a union contract) to the kinds of complaints Thompson has made.



The District argues, on rehearing, that some of Maury's memoranda can be characterized as "letters of direction," see Thompson, 570 A.2d at 282-283, "letters of warning," see id., and "written reprimands" permitted as "corrective actions" by the collective bargaining agreement between the District's Public Library and AFSCME.⁸ We agree. Similarly, some of these memoranda come within the provisions of CMPA itself authorizing each agency to

⁸Article XV, Section 1, of the Library's agreement with AFSCME provides for "corrective actions" that include "counseling" by the employee's immediate supervisor, an "oral reprimand," a supervisor's "letter of direction/warning," and a supervisor's "written reprimand." CONTRACT BETWEEN THE DISTRICT OF COLUMBIA PUBLIC LIBRARY, DISTRICT OF COLUMBIA GOVERNMENT AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 20, LOCALS 1808 AND 877 AT 18-19 (March 1982) [LIBRARY-AFSCME CONTRACT].



use "corrective measures" such as
"reprimands."⁹

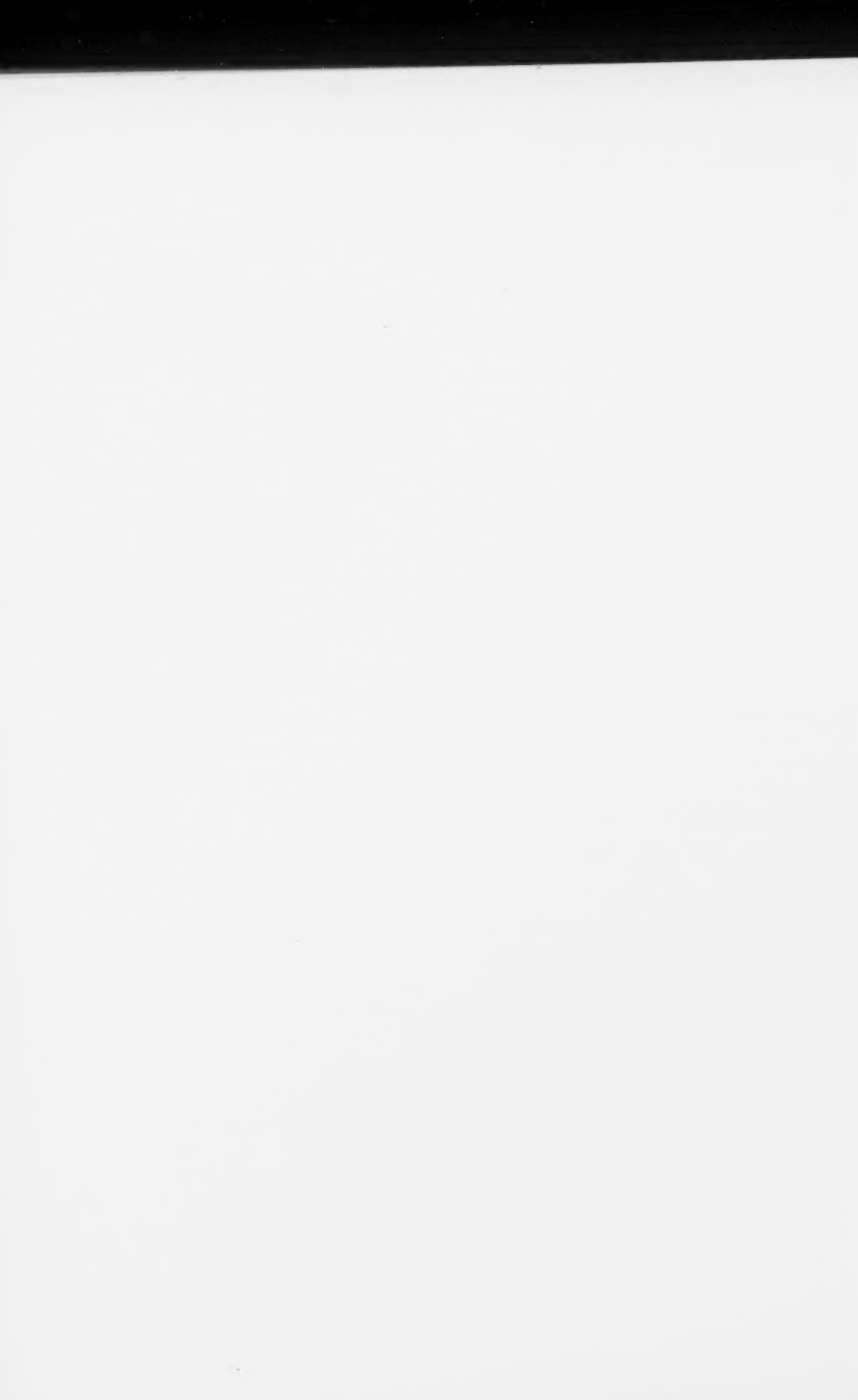
We also agree with the District that other Maury memoranda appear to be directed at more serious forms of discipline under CMPA, such as discharge for an unsatisfactory "performance rating," see id. at 283-84, or for "cause" defined, for example, as "incompetency" or "inexcusable neglect of

⁹CMPA provides: "The Mayor. . .shall issue rules and regulations establishing internal agency corrective, rather than punitive, measures. Adverse action procedures shall not be in conflict with these corrective measures nor with any provisions of this subchapter. Such rules and regulations may provide for reprimands and for suspensions for 30 days or less. The appropriate personnel authority shall administer the disciplinary procedures established under this subsection, subject to the provisions of subchapter VI of this chapter. The extent of the corrective action shall reflect the severity of the infraction." D.C. Code § 1-617.1(a).



duty," or "insubordination."¹⁰ These memoranda, similarly, could serve as the

¹⁰CMPA provides that nonprobationary employees and certain others "may be suspended for more than 30 days, reduced in rank or pay, or removed. . . only for cause and only in accordance with the provisions of this subchapter and subchapter VI of this chapter. The extent of the corrective action shall reflect the severity of the infraction." D.C. Code § 1-617.1(b). "Cause" is defined to embrace twenty-two categories, including: "Fraud in securing appointment or falsification of official records," "Incompetency," "Inefficiency," "Inexcusable neglect of duty," "Insubordination," "dishonesty," "Drunkenness on duty," "On-duty use of drugs not prescribed and/or obtained illegally," "Inexcusable abuse without leave," "Conviction of a felony," "Engaging in a strike." Id. § 1-617.1 (d) (Supp. 1990). See District of Columbia Dep't of Corrections v. Teamsters Union Local No. 246, 554 A.2d 319, 326 (D.C. 1989) (affirming trial court order that enforced arbitration award reinstating employee fired for behavior not within express terms of CMPA's definition of "cause".)



basis for a disciplinary action under the Library-AFSCME contract.¹¹

The District adds--and again we agree--that Thompson was not limited to defending herself from corrective or disciplinary actions based on the Maury memoranda; she was entitled to initiate grievance proceedings under CMPA, see supra notes 6 and 7, or under the

¹¹Article XV, Section 2 ("Disciplinary Actions"), of the Library-AFSCME contract, see supra note 8, requires the employer to make a "careful inquiry" before issuing a notice of proposed disciplinary action. Article XV, Section 2, further provides--with respect to employees for whom the employer proposes a furlough of more than fourteen days, furlough without pay, reduction in rank or compensation, or discharge--that the employee receive thirty days' notice, with an opportunity to reply, followed by a decision at the "earliest possible date." The notice must inform the employee of the reason for the action and of the right of appeal under "the prescribed steps of the Grievance Procedure." Id.



Library-AFSCME contract.¹² A grievance would include many, if not all, of the items that caused Thompson distress: for example, the denial of leave, the allegedly inaccurate letters of warning, and the charges of excessive leave-taking. See supra note 6.

Although Thompson had many opportunities to challenge what she perceived as unfair treatment, she filed grievances--through her union--on only two occasions. In May 1982, Thompson used the Library-AFSCME grievance procedure to seek additional computer training and an upgrade in job

¹²Article XVI, Section 2, of the Library-AFSCME Contract provides: "Any employee of the District of Columbia Public Library who has just cause to believe that his/her rights under the working regulation of the District of Columbia Public Library as stipulated by this Agreement have been affected adversely shall be entitled to submit a grievance. . . ."

classification. After a meeting with Thompson and her AFSCME representative, Maury submitted a memorandum to AFSCME denying Thompson's grievance. Thompson elected not to process the grievance beyond this first step.¹³

Thompson also sought to use her collective bargaining right to challenge

¹³Article XVI, Section 2, of the Library-AFSCME Contract allows Thompson to present her grievances through four steps. The first step is an oral presentation to the employee's immediate supervisor within ten working days of the employer's allegedly unfair action or the employee's knowledge of it. The supervisor must reply orally or in writing within five days. If the grievance is unresolved, step two provides for a hearing, at the union's request, before the department head, with a response required within five working days of the hearing. If necessary, the third step is a hearing, at the union's request, before the Director of the Public Library, who must respond within five working days after the hearing. The fourth step provides for arbitration invoked by the union's written notice to the Library Director within fifteen working days of the decision at step three.

her proposed termination.¹⁴ On August 2,

¹⁴The Library's July 25, 1983 final notice of termination informed Thompson of her right under the Library-AFSCME contract "to appeal this decision using the appropriate steps outlined in the negotiated Grievance Procedure." This notice complied with the requirements of the Library-AFSCME contract. See supra note 11. The District argues this notice was defective because it did not inform Thompson of her right to appeal her termination to the Office of Employee Appeals. D.C. Code § 1-606.4(e). The District, therefore, in effect, asks us to conclude that the negotiated notice procedures are defective in light of the statutory notice requirement of § 1-606.4(e). See District of Columbia v. Daniels, 523 A.2d 569, 570 (D.C. 1987) (remanding case to OEA because police department failed to notify employee of right to appeal to OEA). The only issue in Daniels, however, was the claimed inappropriateness of an agency notice that told an employee "no further administrative appeal is permitted." Id. at 570. The scope of an employee's right to receive notice under a union contract was not at issue. In Thompson's case, the agency complied with the explicit terms of a negotiated contract. Under these circumstances, there was no defect in the notice, especially in light of D.C. Code §§ 1-602.2(b), -617.3(d), which clearly state that negotiated procedures for adverse action review need not conform to the statutory notice provisions of § 1-606.4(e).



1983, AFSCME processed a grievance for Thompson through three of the four steps specified in the collective bargaining agreement. See supra note 13. A hearing was held on September 8, and a decision was issued on September 15 upholding her termination. AFSCME declined to take the grievance to step four, arbitration, and Thompson took no further appeals.¹⁵

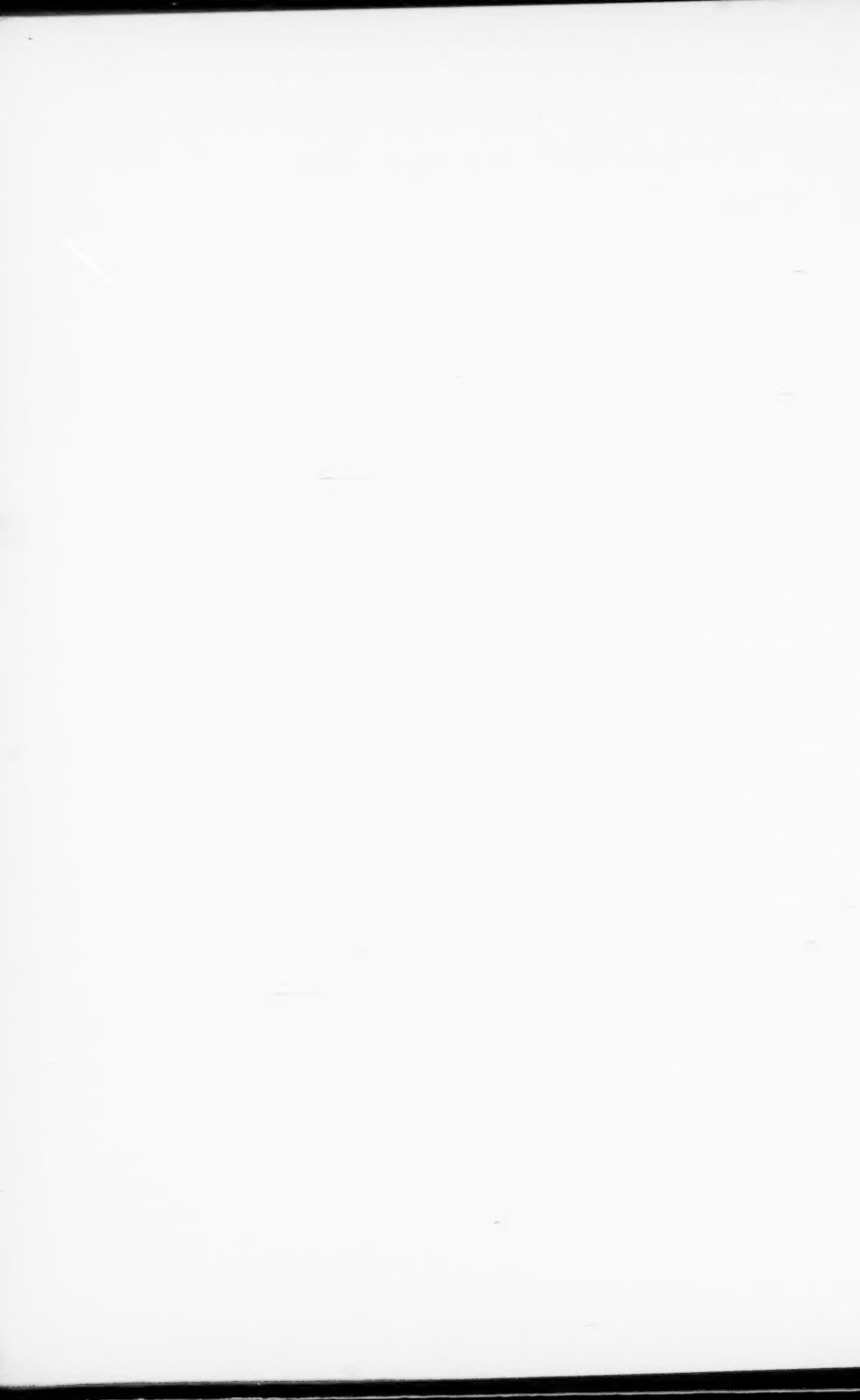
In sum, a public employee such as Thompson has comprehensive rights to notice, hearing, appeal, and judicial review of performance ratings and adverse personnel actions under CMPA and under any CMPA-endorsed union contract. Moreover, both CMPA and a union contract afford the employee rights to file grievances against the governmental

¹⁵If Thompson was dissatisfied with AFSCME's representation, CMPA permitted her to file a complaint with PERB, subject to judicial review in Superior Court. See supra Part I.B.

employer for any matter "which impairs or adversely affects" the employee's "interest, concern, or welfare," D.C. Code § 1-603.1 (1); supra note 6. The employee also has rights against the union for inadequate representation. See supra Part I.B.; note 15. The District argues that all of Thompson's complaints except the one for assault and battery were cognizable under CMPA Subchapters 15 and 17 or under the Library-AFSCME Contract. The District accordingly urges us to hold that CMPA's remedies are exclusive and, as a consequence, that Thompson is precluded from bringing her defamation and emotional distress claims to court.

II.

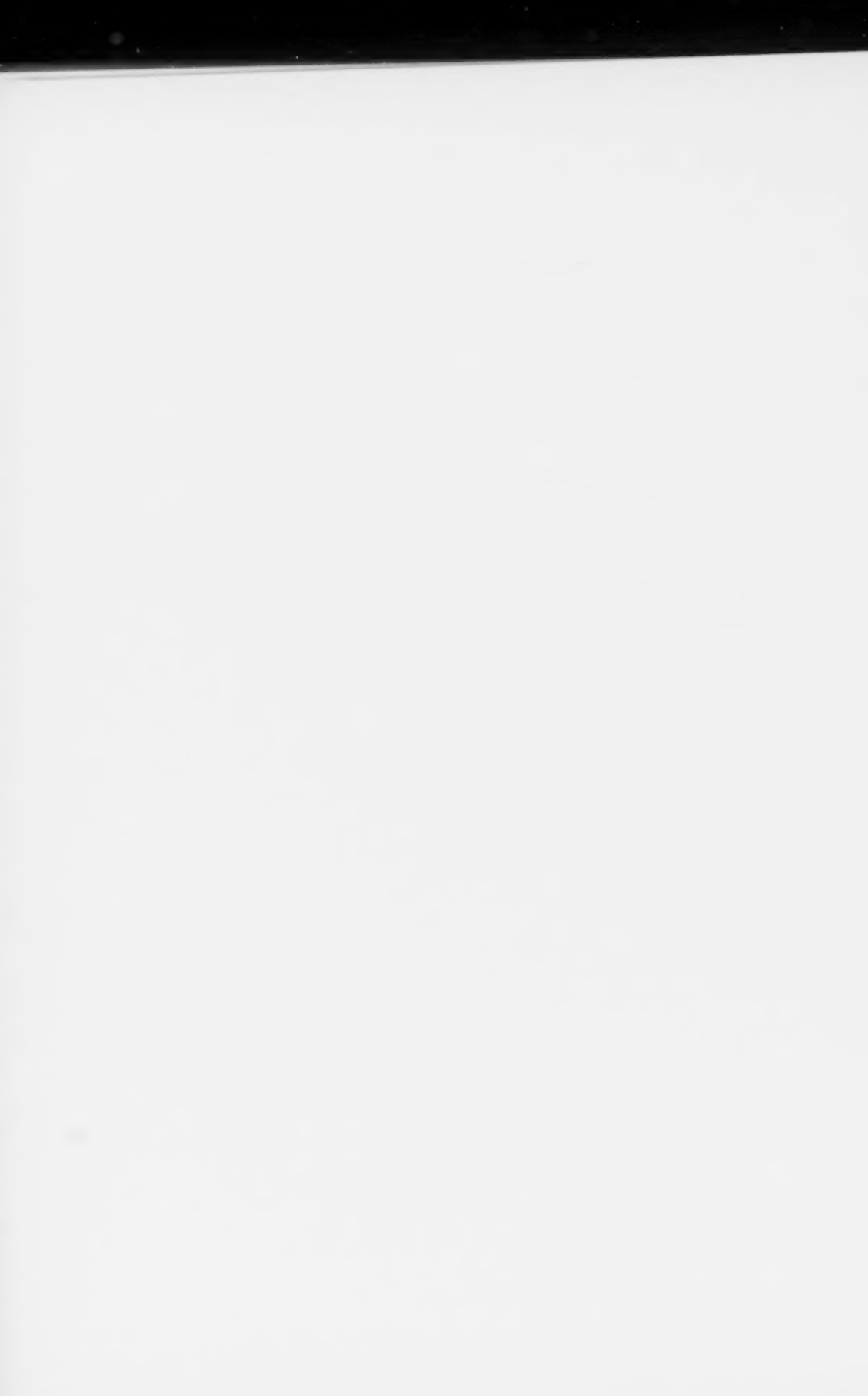
The CMPA provisions that govern "performance ratings," "adverse actions," and "grievances" (which we sometimes



refer to collectively as "personnel evaluation provisions")--unlike the CMPA disability provisions--do not provide that they are exclusive and preclude common law claims. Compare D.C. Code §§ 1-615.1 to -615.5 and 1-617.1 to -617.3 with id § 1-624.16(c)¹⁶; see Thompson, 570 A.2d at 289. The first question we must revisit, therefore, is whether the failure of the legislature to provide explicitly for exclusive remedies in CMPA §§ 1-615.1 to -615.5 and §§ 1-617.1 to -617.3 was intended to leave employees free to pursue all claims arising out of

¹⁶The exclusivity provision governing disability claims, D.C. Code § 1-624.16(c), provides:

The liability of the District of Columbia government. . .under this subchapter. . .with respect to the injury or death of an employee, is exclusive and instead of all other liability of the District of Columbia government. . .to the employee. . .in a direct judicial proceeding, [or] in a civil action. . . .



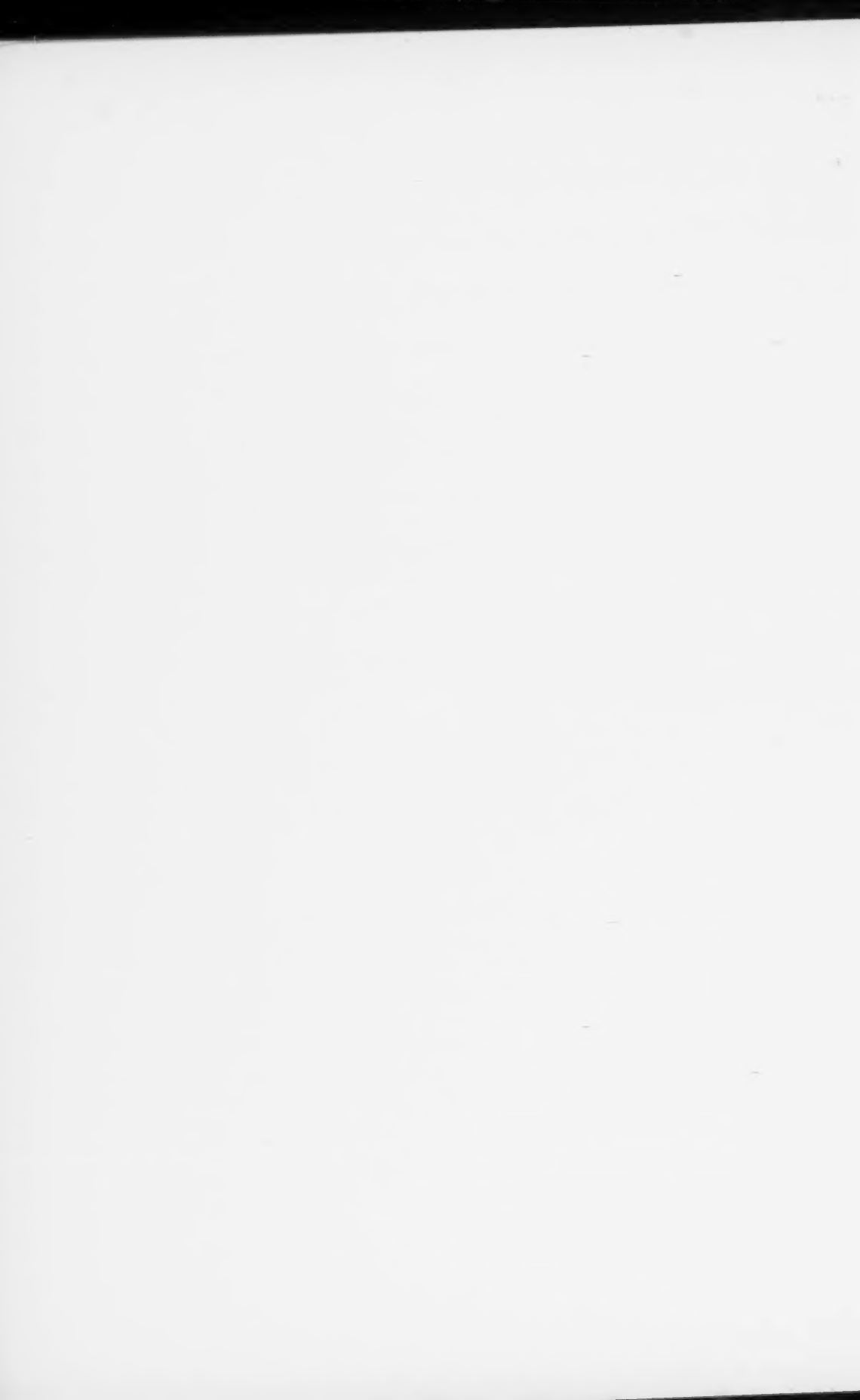
their employment as common law actions in court, unless covered by the CMPA disability provisions.¹⁷

¹⁷Our analysis is premised on the assumption that, but for CMPA, District employees would have common law tort remedies available against their public employer, including their supervisors. The various subchapters of CMPA became law at different times beginning March 3, 1979 and extending as late as January 1, 1980 and in some cases thereafter. See D.C. Code § 1-637.1 (1987). Immediately before CMPA became effective, District employees were subject to the disability provisions of the Federal Employees' Compensation Act (FECA), Publ. L. No. 89-554, 80 Stat. 532 (1966), 5 U.S.C. §§ 8108-8193, and to the personnel evaluation provisions of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified, as amended, in various sections of 5 U.S.C.), as well as to earlier federal laws incorporated into District of Columbia law. See D.C. Code §§ 1-213(c), -242(3). The courts have held that CSRA preempts common law remedies. See David v. United States, 820 F.2d 1038, 1043 (9th Cir. 1987); Lehman v. Morrissey, 779 F.2d 526, 528 (9th Cir. 1985) (per curiam). It is therefore questionable whether District employees have had common law remedies available for defamation or emotional distress actions against their public employer before CMPA. The common law, however, generally applies in the District of Columbia absent statutory repeal, Nelson v. Nelson, 548 A.2d 109, 112 & n.3 (D.C. 1988), and none of the parties has

A.

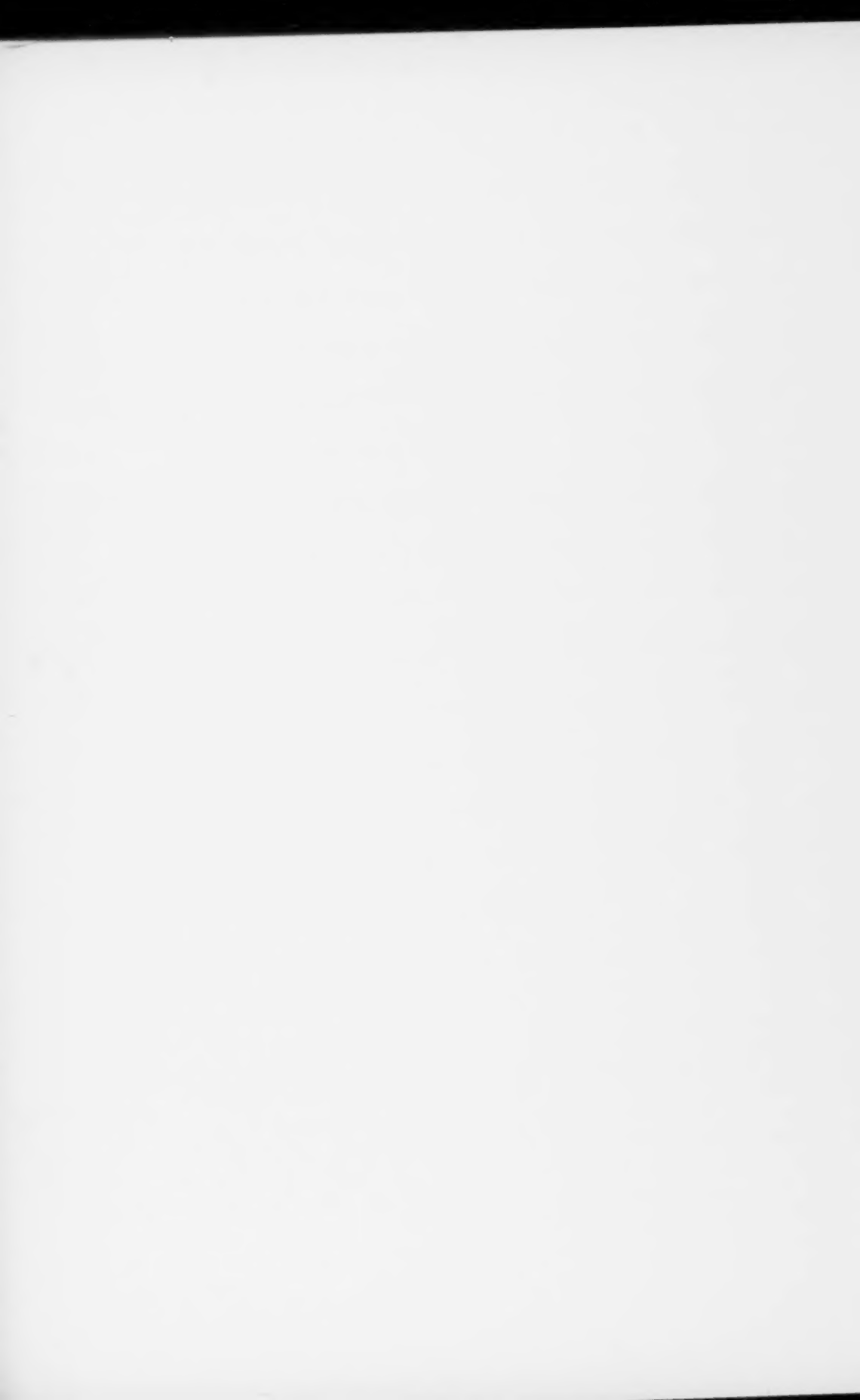
In our earlier opinion we concluded that CMPA's personnel evaluation provisions did not preempt common law remedies for three reasons. First, we indicated that these provisions and CMPA's disability provisions should be construed with reference to each other. We implied that, by writing an exclusivity provision into the disability section of the act, the Council had demonstrated its familiarity with the use of such language and thus that the Council's failure to make the personnel

questioned the availability of common law remedies absent CMPA. For these reasons, we are willing to assume, without deciding, that at the instant CSRA became inapplicable to public employees, common law remedies for such causes of action became available unless preempted by CMPA. Cf. Newman v. District of Columbia, 518 A.2d 698, 706 (D.C. 1986) (exclusivity provision in CMPA's disability compensation scheme does not bar common law claim for intentional infliction of emotional distress).



evaluation provisions exclusive was intentional. Thompson, 570 A.2d at 289. Second, drawing on a traditional canon of statutory construction, we said we would "not construe a statute as altering the common law beyond what the words of the statute require." Id. (citing Dell v. Department of Employment Services, 499 A.2d 102, 107 (D.C. 1985)).¹⁸ Finally, although "some federal courts have ruled that comprehensive administrative schemes such as CMPA preempt common law claims," id., we distinguished these cases on the ground that they "were decided on the basis of federal preemption of state law, a doctrine not applicable in the present case." Id. (footnote omitted.)

¹⁸See also Shaw v. North Pennsylvania Ry. Co., 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.")



We are no longer persuaded by our previous analysis. In the first place, statutory sections should not be read with reference to each other (sometimes called in pari materia) if their respective subject matters and purposes are different. See Holt v. United States, 565 A.2d 970, 975 (D.C. 1989) (en banc) ("Statutory provisions in pari materia relate to the same subject matter or have the same purpose or object") (citations omitted). Moreover, although courts have indicated that statutes adopted at the same time are more likely to be in pari materia than those enacted at different times, compare Tabas v. Crosby, 444 A.2d 250, 255 (Del. Ch. 1982), with State v. Loscomb, 435 A.2d 764, 768 (Md. 1981), we have said that this doctrine "does not refer primarily to coincidence of enactment," Holt, 563_



focus is on subject matter and purpose. See id. The CMPA disability compensation provisions were intended to displace the common law with a compensation scheme that provided fixed, immediate benefits for on-the-job injuries regardless of fault. See Newman v. District of Columbia, 518 A.2d 698, 704 (D.C. 1986). In contrast, the personnel evaluation provisions established a new, comprehensive, merit-based system for evaluating employees, see Stokes, 502 A.2d at 1009--a system that includes extensive provisions for filing grievances and appeals of working conditions and of adverse personnel actions. These two groups of CMPA provisions, therefore, clearly have altogether different subject matters and purposes. Although knit together by their inclusion in one large piece of

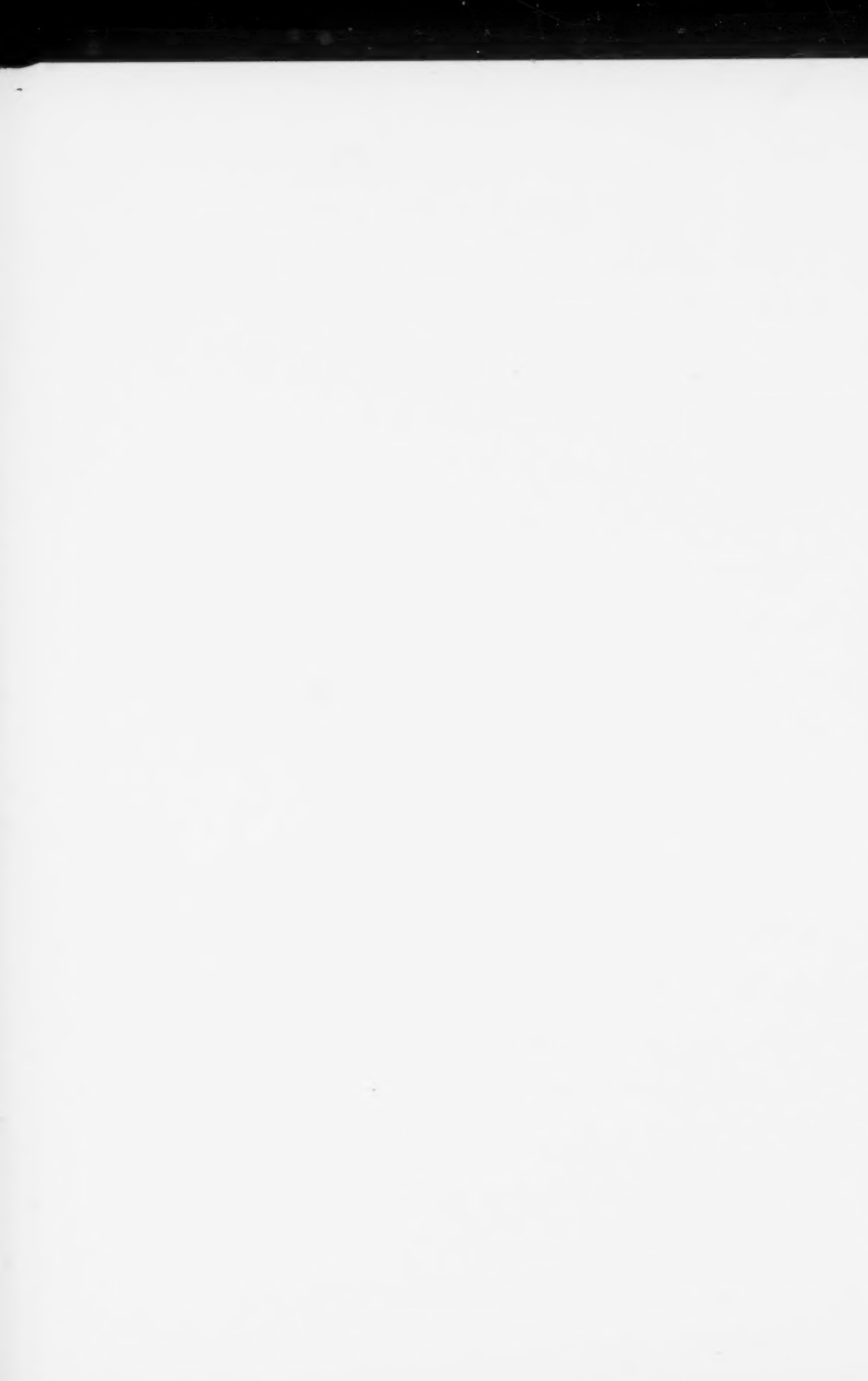
legislation--one omnibus chapter of the District of Columbia Code--intended to cover a diverse array¹⁹ of issues inherent in public employment, the provisions governing personnel evaluation (Subchapters 15 and 17) and those governing disability compensation (Subchapter 24) may be treated as separate statutes.

More specifically, the CMPA personnel evaluations and disability compensation provisions, respectively, have altogether different legislative antecedents. We noted in Newman that

¹⁹CMPA covers not only personnel evaluation and disability compensation but also a variety of other concerns such as equal employment opportunity (Subchapter 7), classifications of service (Subchapters 8-11), classifications of compensation (Subchapter 12), employee rights and responsibilities (Subchapter 16), labor-management relations (Subchapter 18), safety, health, and life insurance (Subchapters 21-23), and retirement (Subchapter 27).

CMPA's disability provisions in Subchapter 24 "[f]or the most part. . .track those of its federal forerunner, FECA"--the Federal Employees' Compensation Act. Newman, 518 A.2d at 704. FECA had antecedents reaching back to 1912, see 5 U.S.C. § 751 (9164 ed.) (discussion of short title). It was comprehensively reorganized and revised in 1966 in Pub. L. No. 89-488, 80 Stat 252 and codified at 5 U.S.C. §§ 8101-8193 (1988). Until CMPA became effective, FECA expressly applied to employees of the District of Columbia. See 5 U.S.C. § 8139 (1988). FECA has an exclusivity provision. See 5 U.S.C. § 8173 (1988).

In contrast, CMPA's personnel evaluation provisions have no direct federal source. CMPA's Subchapter 15 (performance rating) is analogous to Chapter 43 (performance rating) of 5



U.S.C. §§ 4301-4305 (1988), which had its origins in the Performance Ratings Acct of 1950, Publ. L. No. 81-873, 64 Stat. 1098. CMPA's Subchapter 17 (adverse actions; grievances) is analogous to, though substantially different from, Chapter 75 (adverse actions) of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, codified at 5 U.S.C. §§ 7501-7514 (1988), and CSRA Chapter 77 (appeals), 5 U.S.C. §§ 7701-7703 (1988). Chapters 75 and 77, in turn, are traceable to the comprehensive revision of Title 5 of the U.S. Code in 1966, Pub. L. No. 89-554, 80 Stat. 532, which also included revisions of FECA. These CSRA chapters and their predecessors expressly applied to District employees, see 5 U.S.C. § 4301 (1)(f)(1977), and do not contain an exclusivity provision.

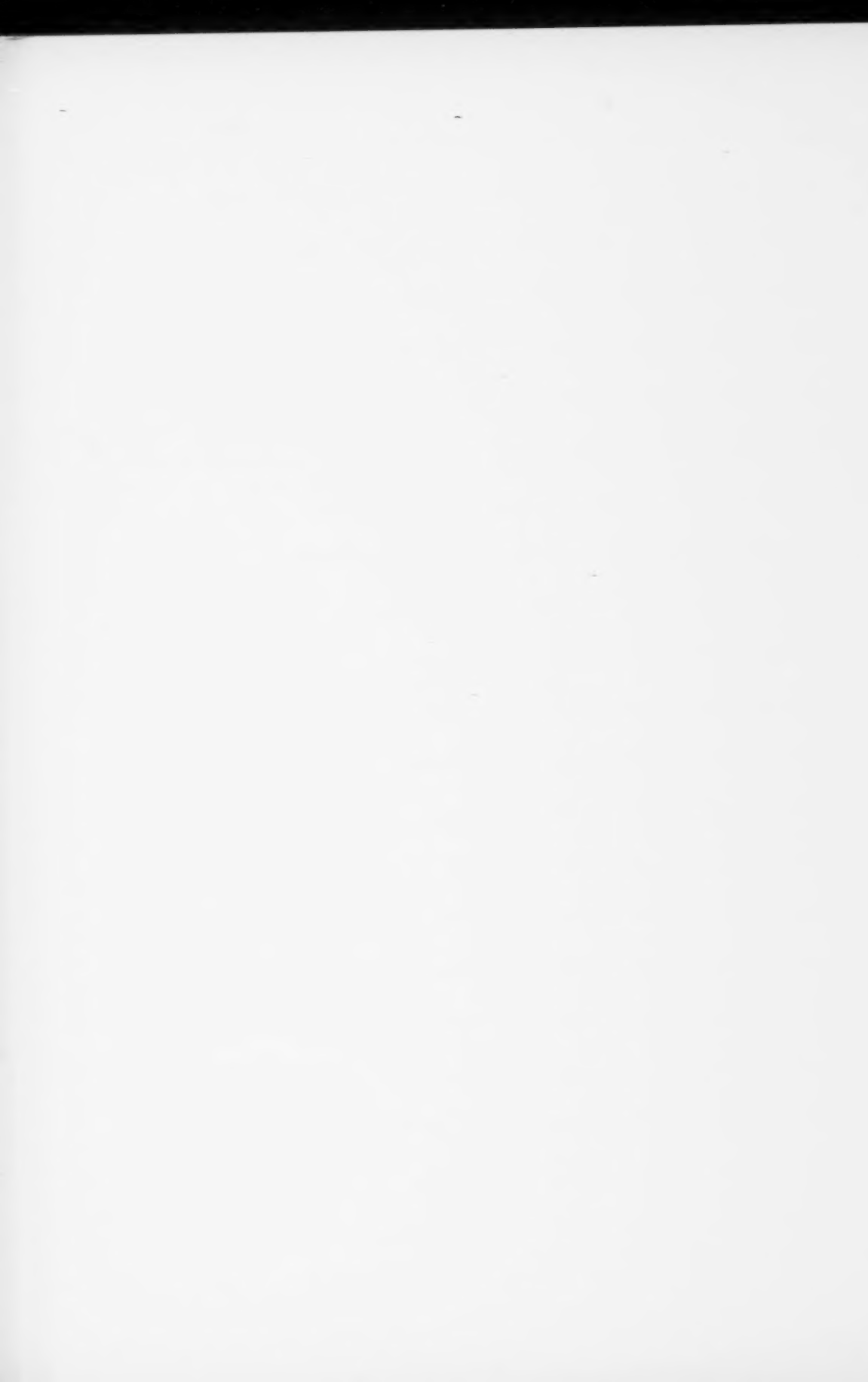


The Council of the District of Columbia adopted CMPA because home rule legislation had called upon the Council to establish a "District government merit system" to replace legislation Congress previously had enacted for the District of Columbia, "including, without limitation," legislation to cover "appointments, promotions, discipline, separations, pay, unemployment compensation, health, disability and death benefits, leave, retirement, insurance, and veterans' preference." D.C. Code § 1-242(3)(1987). Accordingly, the Council was called upon to enact disability compensation legislation corresponding to a long-standing federal statute (FECA) and also to adopt personnel evaluation legislation covering performance ratings and adverse actions/grievances which, respectively,



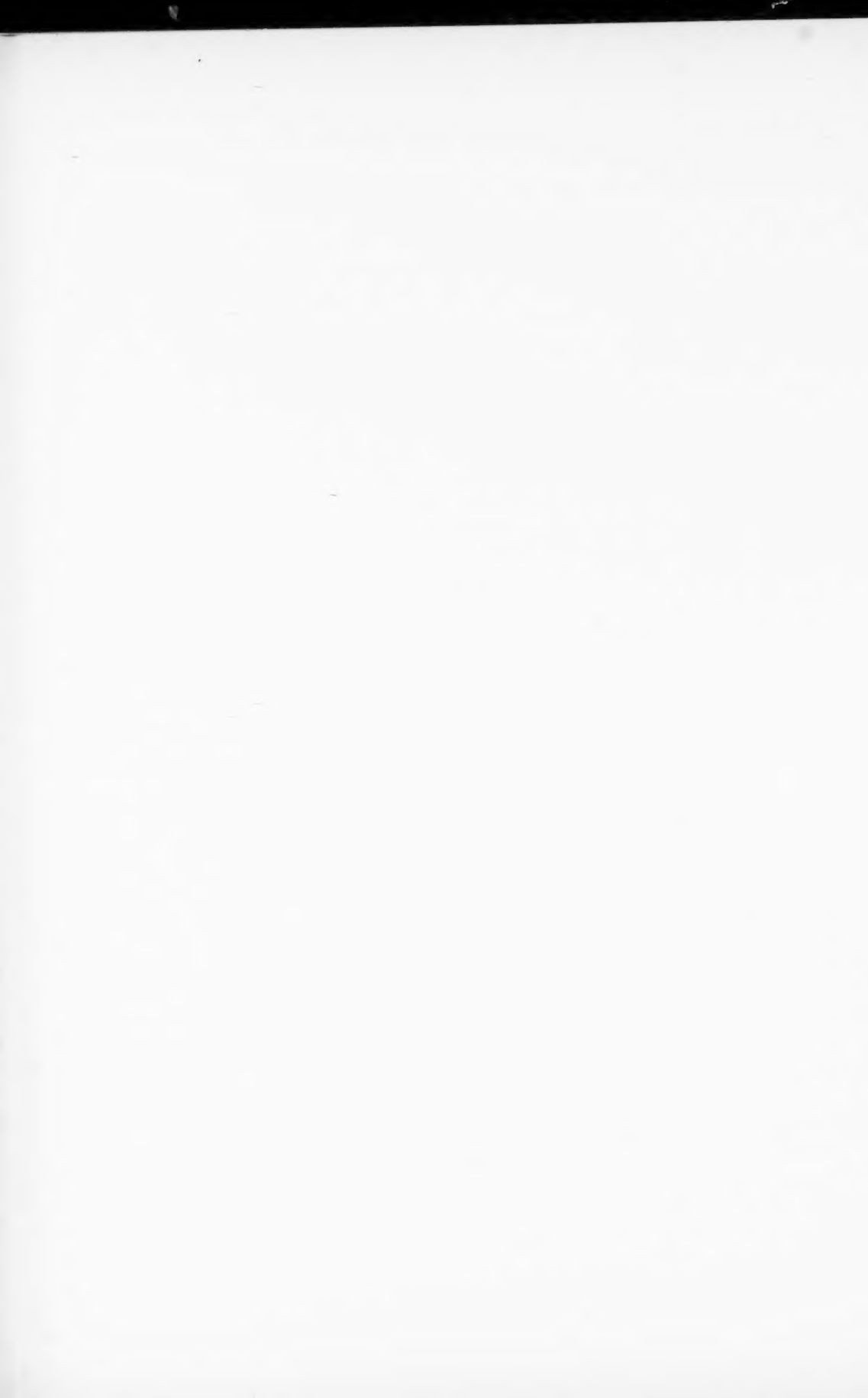
had different federal sources from one another. As it turned out, in adopting CMPA the Council tracked FECA, see Newman, 518 A.2d at 704, but developed quite different personnel evaluation provisions from those Congress adopted for federal employees.

Given this history showing legislative antecedents in different statutes, enacted at different times, though codified in the same title of the U.S. Code, and further given the fact that the CMPA personnel evaluation and disability compensation subchapters reflect altogether different purposes and subject matters, we conclude that these CMPA subchapters were developed for all practical purposes as separate pieces of legislation, though contained in the same omnibus act. These disability and personnel evaluation provisions,



therefore, do not meet the criteria for interpretation in pari materia.²⁰

²⁰Our dissenting colleague disagrees with this majority opinion primarily for three related reasons: he believes all the statutory provisions at issue should be construed in pari materia; he notes that the "exclusive" remedy language found in the disability compensation provisions, D.C. Code § 1-624.16(c), supra note 16, does not appear in the personnel evaluation provisions; and he therefore concludes that the Council intended these latter provisions not to incorporate an exclusive form of remedy. He bases his premise (in pari materia) on language from cases like Russello v. United States, 464 U.S. 16, 23 (1983), which he says "fits this case like a glove." Post at 37. We believe the language does not fit at all. Justice Blackmun described Russello as "yet another case concerning the Racketeer Influenced and Corrupt Organization (RICO) chapter of the Organized Crime Control Act of 1970." Id. at 17. More specifically, Russello concerned interpretation of the word "interest" as used in one subsection of the Act after another. The question presented was whether the words "any interest. . .acquired" in § 1963 (2) could embrace "profits" of a corporation or were limited, as in § 1963 (1), to an equity "interest in the enterprise"--in which case the petitioner's evil deeds would not have been covered by the statute. See id. 22-23. The Court concluded that § 1963(2) had a more expansive reach than § 1963(1) and thus reached the petitioner's conduct--a classic use of construction of closely



Second, the venerable canon that would have us strictly construe a statute against altering the common law creates "a rebuttable presumption." Monroe v. Foreman, 540 A.2d 736, 739 (D.C. 1988) (construed No-Fault Act to preclude common law negligence action for personal injuries from automobile accident). We have emphasized that "[t]he rule that statutes in derogation of the common law

linked subsections in pari materia. As we have said in the text above, however, the instant case concerns a statute with subchapters--personnel evaluation and disability compensation--that have altogether different purposes, subject matters, and legislative antecedents. Moreover, when the Supreme Court ruled in United States v. Fausto, 484 U.S. 439 (1988), that CSRA, see supra note 17, precluded a federal employee from suing under the Back Pay Act, no one argued against such preclusion by citing the absence of an exclusivity provision, in contrast with the presence of the exclusivity provision in FECA, 5 U.S.C. § 8173. Respectfully, therefore, we disagree with our colleague. As we understand the caselaw, these subchapters should not be construed in pari materia.

are to be strictly construed does not require such adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.'" Id. (quoting Jamison v. Encarnacion, 281 U.S. 635, 640 (1930)). Moreover, in attempting to ascertain legislative intent for a modern, comprehensive, regulatory statute that creates new rights and remedies, we are mindful that "[a]n exception to the rule of strict construction is customarily made in the case of a statute which purports to provide a complete system of law covering all aspects of the subject with which it deals. . . ." 3 N. SINGER, SUTHERLAND STATUTORY CONSTRUCTIONS § 61.03 (4th ed. 1986); see Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-42 (1907) (because Interstate



Commerce Act intended to afford comprehensive means for redressing wrongs resulting from unjust rate discrimination, shipper cannot sue at common law for excessive freight rates). Accordingly, in such a situation--which appears to be the instant case--the presumption of strict construction against repeal of common law remedies may not easily survive an in-depth inquiry into legislative purpose. See Monroe, 540 A.2d at 739, 741-43 (statutory language and entire legislative scheme of No-Fault Act rebuts presumption that common law negligence action remains available in case of automobile accident); cf. Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984) ("[T]he presumption favoring judicial review of administrative action may be overcome by inferences of [legislative]

intent drawn from the statutory scheme as a whole.")

B.

When a statute creating new rights and remedies does not expressly exclude common law remedies or declare new remedies exclusive, we decide whether such remedies remain available by looking initially at "the purpose of [the statute], the entirety of its text, and the structure of review that it establishes." United States v. Fausto, 484 U.S. 439, 444 (1988) (Civil Service Reform Act of 1978 precludes employee's suit under Back Pay Act). "Whether. . . a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action

involved." Block, 467 U.S. at 345
(holding consumers were precluded from
obtaining judicial review under
Agricultural Marketing Agreement Act of
1937 of milk market orders issued by
Secretary of Agriculture because would
disrupt complex administrative scheme).

1. Purpose of CMPA

CMPA was designed to replace a
"disjointed, decentralized personnel
system [which was frequently alleged to
tolerate] [p]atterns of abuse, neglect,
incompetence, error, [and] alleged
retaliation by superiors against wronged
employees. . . ." COUNCIL OF DISTRICT OF
COLUMBIA, DISTRICT OF COLUMBIA
COMPREHENSIVE MERIT PERSONNEL ACT OF
1978, COMM. REPORT ON BILL NO. 2-10, 24
(July 5, 1978), [COMMITTEE REPORT],
reprinted in HOUSE COMM. ON THE DIST. OF
COLUMBIA, DISTRICT OF COLUMBIA GOVERNMENT

COMPREHENSIVE MERIT PERSONNEL ACT OF 1978
AND REPORT OF THE COUNCIL OF THE DISTRICT
OF COLUMBIA, 96TH CONG., 1ST SESS. 142
(Comm. Print 1979). The then-existing
personnel system was "in disarray" and
"chaos"; it was an "inefficient hodge-
podge system [that] ignore[d] the
rudimentary merit rules" and "awkwardly
meshed" the District personnel apparatus
with the federal personnel system.
COMMITTEE REPORT at 26. This "incredibly
inefficient, often counter productive"
system required "the creation of a truly
uniform system of merit personnel
administration." Id.

By enacting CMPA, the Council of the
District of Columbia fulfilled the
mandate of the District of Columbia Self-
Government (Home Rule) Act²¹ to develop

²¹Pub. L. No. 93-198, § 422(3), 87
Stat. 774, 791 (1973) (codified at D.C.
Code § 1-242(3) (1987)).

its own comprehensive merit personnel system to "replace the federal system which had previously controlled the District government's relations with its employees." Hawkins, 537 A.2d at 574; see Newman, 518 A.2d at 703; American Fed'n of Gov't Employees v. Barry, 459 A.2d 1045, 1049 (D.C. 1983). The Council recognized the inadequacy of the existing personnel system that "not only encourage[d] abuse but [was] deficient in adequate procedures to protect the employees once those abuses have occurred." COMMITTEE REPORT at 26. The Council was concerned about complaints of "Threats and coercion [used] to force employees with personnel grievances to withdraw them or to keep them to themselves." Id. at 25. The Council intended the CMPA to remedy these problems:

--City-wide rules and regulations will assure consistent application of personnel policies in all government agencies.

--Judicial review is provided for all decisions of the Public Employee Relations Board and Office of Employee Appeals to assure an impartial review of governmental administrative decisions affecting personnel.

--The opportunity for retaliation against employees exercising their right will be minimized by the careful provisions granting employee rights and responsibilities; authority for independent review by the Corporation Counsel; and finally, appellate authority within the Office of Employee Appeals and the courts.



Id. at 42.

In sum, in enacting CMPA, the Council intended to create "a modern, flexible, comprehensive city-wide system of public personnel administration" that would provide "for the efficient administration of the District personnel system and establish impartial and independent administrative procedures for resolving employee grievances."

COMMITTEE REPORT at 39, 40.²²

²²The statute itself incorporates these purposes:

§ 1-601.2. Purpose

(a) The Council of the District of Columbia declares that it is the purpose and policy of this chapter to assure that the District of Columbia government shall have a modern flexible system of public personnel administration, which shall:

* * *

(2) Create uniform systems for personnel administration among the executive departments and agencies.

. . ;

* * *

2. Entirety of CMPA Text; Structure of Review

The statutory provisions outlined above in Part I.B. reflect the comprehensive purpose just outlined, including significant employee rights not only in the disciplinary process but also in the grievance system. Moreover, CMPA provides for a comprehensive system of administrative review of employer actions--whether under CMPA itself through OEA or under a union contract subject to PERB--and in each case subject

(4) Insure the efficient administration of this personnel system;

(5) Establish impartial and comprehensive administrative or negotiated procedures for resolving employee grievances;

(6) Provide for a positive policy of labor-management relations including collective bargaining between the District of Columbia government and its employees[.]

D.C. Code § 1-601.2.

to judicial review in Superior Court.

See supra Part I.B.

The legislative history does not reflect whether, in enacting CMPA, the Council intended to foreclose tort remedies. The Committee Report, however, did stress a role for the courts, but only a limited role: judicial review of administrative decisions. See COMMITTEE REPORT at 42. The Committee Report called significant the creation of "[a]n Office of Employee Appeals, which is an independent personnel appeals authority which will hear all personnel-related employee appeals." COMMITTEE REPORT at 43 (emphasis added). While this language does not say the OEA channel is exclusive (in part because the Council was careful not to foreclose the District and its unions from bargaining for creation of alternative review procedures), it

appears the Committee Report was not contemplating the possibility of still other remedies.

It would seem, therefore, from the purpose and text of CMPA, including its judicial review provisions, that the Council "plainly intended"²³ CMPA to create a mechanism for addressing virtually every conceivable personnel issue among the District, its employees, and other unions--with a reviewing role for the courts as a last resort, not a supplementary role for the courts as an alternative forum.

III.

An additional way of testing legislative intent--i.e., whether CMPA's comprehensive remedial system should be understood to preclude, or to leave room

²³Monroe, 540 A.2d at 739 (quoting Jamison, 281 U.S. at 640).

for, common law tort remedies--is to focus on whether the continued availability of common law damage remedies would complement or undermine the statutory scheme as a whole. See Block, 467 U.S. at 349.

The District argues that the costs associated with the availability of common law remedies are substantial and would undermine CMPA's merit personnel system. More specifically, says the District, an overlay of tort remedies would be costly not only directly in terms of money, but also indirectly in terms of the time and energy managers would have to devote to defending their actions in two dispute-resolving systems. The District expresses concern that employees who lose at the administrative level--with its efficient time frames and simplified procedures--might compel

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supervisors to undergo lengthy proceedings a second time over the same claim, this time in court, simply for telling the truth.

We do not agree that two dispute-resolving options--administrative review and tort litigation--would necessarily lead to duplicative handling of the same dispute; doctrines of claim preclusion and election of remedies, for example, are usually available to prevent that particular evil. But we do agree that the burdens of an employer's having to anticipate and deal with two, often substantially different, remedial systems (one of them protracted litigation) available at the election of each employee are likely to have a chilling effect on mandated and bargained personnel procedures--an effect that could debilitate the very foundation of

the merit personnel system. For example, supervisors are likely to be hesitant to enforce employee discipline, preferring silence to the fear of being hauled into court for fulfilling their statutory duties. Cf. Bush v. Lucas, 462 U.S. 367, 388-89 (1983) (Court declines to supplement comprehensive Civil Service Commission regulations by creating new, constitutional damage remedy for employer's violation of employee's First Amendment rights).²⁴ Negotiated

²⁴The dissent argues that the "present case is the converse of Bush." Post at 42. Our colleague says that because the Bush Court refused to supplement comprehensive civil service regulation with a new constitutional remedy, absent legislative authorization, we should "eschew the destruction of common law rights by judicial fiat." Post at 42 (emphasis in original). We have noted there is a substantial likelihood, however, that immediately before the Council adopted CMPA, common law remedies had been preempted by CSRA and thus were not available for defamation and emotional distress actions against a public employer. See supra note 17. Accordingly, just as the Bush Court was

procedures for union representation of aggrieved employees are likely to be ignored, with the goal of efficient, uniform resolution of grievances accordingly undermined. Ultimately, the public will pay the price as employee morale deteriorates from lax disciplinary enforcement and public services consequently suffer. As the United States Court of Appeals for the District of Columbia Circuit has recognized:

The strong governmental interest in having a frank and honest assessment of. . .employee work performance is

unwilling to find a new constitutional remedy to augment a comprehensive regulatory statute, we question whether the Council intended to resurrect common law remedies to supplement CMPA's comprehensive scheme. But even if common law remedies were available before CMPA, the policy reasons evident in Bush for precluding dual remedies are consistent with the Council's apparent reliance on the courts exclusively for reviewing administrative action.

absolutely essential to the proper rendering of. . . services to our citizens. A supervisor's candid evaluation promotes efficient government by enabling an agency to identify and reward truly outstanding performance and to identify and correct, and on occasion to dispense with, performance that is unsatisfactory.

Lawrence v. Acree, 215 U.S. App. D.C. 16, 24, 665 F.2d 1319, 1327 (1981)

The remedies available under CMPA are substantial and may, in some respects, afford more complete relief than the damage remedies available at common law. For example, under CMPA, Thompson would have been able to seek

reinstatement, and perhaps back pay.²⁵

Furthermore, the CMPA does not require an employee to overcome the qualified immunity of government officials as would be required in a common law damage action. See Lucas, 462 U.S. at 391 (Marshall, J., concurring); Rustin v. District of Columbia, 491 A.2d 496, 500 (D.C.), cert. denied, 474 U.S. 946 (1985). Moreover, CMPA procedures are speedier and less costly than litigation. In sum, the benefits of CMPA's administrative procedures coupled with judicial review are substantial when balanced against the costs, including

²⁵CMPA defines OEA's power to grant relief very broadly. The Act permits OEA to "uphold, reverse or modify the decision of the agency" and to take "appropriate corrective actions" and "corrective or remedial action." D.C. Code §§ 1-606.3(b), -617.2, -617.3(b). Similarly, PERB is empowered to "reinstate, with or without back pay, or otherwise make whole, the employment or tenure of any employee. . . ." D.C. Code § 1-618.13(a).

delays, in obtaining damage remedies. We cannot say these advantages are clearly outweighed by the one obvious disadvantage of CMPA: the lack of a jury trial option. See Lucas, 462 U.S. at 391 (Marshall, J., concurring).

We do not believe the Council would characterize CMPA's comprehensive "performance ratings," "adverse actions," and employee "grievances" provisions as affording adequate remedies in only some, not all, instances where an employee claimed wrongful treatment cognizable under those provisions. Given the Council's clearly articulated policy goals of uniformity and efficiency, its carefully crafted provisions balancing employee rights to union representation and grievance processing with the needs of a merit personnel system, and the comprehensiveness of CMPA's remedies, we

conclude that the Council intended CMPA to provide District employees with their exclusive remedies for claims arising out of employer conduct in handling personnel ratings, employee grievances, and adverse actions. Thompson's tort claims of defamation and intentional infliction of emotional distress, in contrast with her assault and battery claim, see supra note 2, arose out of disputes with her supervisor, appellant Maury, that clearly fall within the scope of CMPA §§ 1-615.1 to -615.5 and §§ 1-617.1 to -617.3. We hold, accordingly, that these provisions preclude litigation of Thompson's emotional distress and defamation claims, in the first instance, in Superior Court.

In so ruling, we express no opinion about how Thompson's claims under these particular CMPA provisions relate to the same claims filed under the CMPA

disability compensation provisions, D.C. Code §§ 1-624.2 to -624.46.

IV.

As indicated earlier, we reaffirm the introduction (except for the last two, dispositional sentences), Part I (facts and proceedings), Part II (CMPA disability provisions), and Part VII (reassignment to different trial judge) of our earlier opinion, District of Columbia v. Thompson, 570 A.2d 277 (D.C. 1990)

We vacate Part III (CMPA performance ratings, adverse actions, and grievance provisions), Part IV (intentional infliction of emotional distress),²⁶ Part

²⁶Thompson, therefore, is free once again to pursue this claim administratively against Maury, as well as the District, subject to arguments (on which we express no opinion) that the claim is precluded by Thompson's failure to raise it in her termination proceeding, or by her pursuit of the claim out of time, or by the need to elect between CMPA's disability and personnel evaluation

V (defamation),²⁷ and Part VIII (summary of disposition), including footnote 23 concerning two additional, minor claims of error. We reaffirm Part VI (erroneous exclusion of evidence of Thompson's prior and post-termination threats and assaults against co-workers, and of Maury's peaceful character) in so far as it pertains to Thompson's assault and battery claim, but we vacate the last paragraph of Part VI, id. at 300, pertaining to the defamation claim.

Accordingly, as to the District of Columbia:

1. We reverse the judgments on Thompson's claims of intentional infliction of emotional distress, defamation, and assault and battery.

remedies.

²⁷See supra notes 3 and 26.

2. We remand for reassignment to a new trial judge and for entry of an order dismissing the emotional distress and defamation claims for lack of subject matter jurisdiction.

3. In ordering dismissal of Thompson's emotional distress and defamation claims, we do not address, let alone resolve, whether Thompson is, or is not, time barred from pursuing these claims administratively under either the CMPA disability provisions or the CMPA personnel evaluation provisions, or both. Nor do we express an opinion, as to Thompson's claims, on whether CMPA requires an election of CMPA remedies, or on how Thompson's claims should be characterized and articulated before a particular agency forum. We also express no opinion on the preclusive effect, in any, of Thompson's failure to raise an

emotional distress or defamation claim or defense in the proceeding that terminated her employment (assuming for argument's sake that such a claim might have been germane to that proceeding).

4. We also remand for entry of an order to stay all further proceedings against the District until Thompson has had a reasonable time to file for disability benefits under CMPA for her claimed assault and battery. In doing so we assume (without deciding) that, under the circumstances Thompson is not time-barred from pursuing this claim administratively.

5. If Thompson does not file her assault and battery claim with DOES within a reasonable time, or if she does file and DOES concludes that the assault and battery claim falls within CMPA's disability provisions, the trial court



shall dismiss that claim against the District. But see Thompson, 570 A.2d at 288 n.6.

6. If DOES decides that the assault and battery claim against the District does not fall within CMPA's disability provisions, the trial court shall order a new trial on that claim.

Finally, as to Maury, we reverse for entry of an order dismissing the defamation and emotional distress claims. In addition, we reverse and remand Thompson's assault and battery claim against Maury for a new trial before a different judge.

Reversed and remanded.

Schwelb, Associate Judge,
dissenting: Adopting the language of one of this nation's most eloquent jurists, the Supreme Court recently capsulized in

two sentences the principles which, in my opinion, ought to dispose of this case:

What the [District] asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

West Virginia Univ. Hosps., Inc. v.

Casey, _____ U.S. _____, _____, 111 S.

Ct. 1138, 1148 (1991), (quoting Iselin v.

United States, 270 U.S. 245, 250-51

(1926) (per Brandeis, J.)). At the risk

of precipitating a critic's resort to

Emerson's old chestnut that a foolish

consistency is the hobgoblin of little

minds, I continue to think that we were

right the first time. Accordingly, I

respectfully dissent.

The problem presented by the District's petition for rehearing is not an easy one. I agree with my colleagues that it would have made sense as a matter of legislative policy to include in the CMPA a provision that the administrative remedies created by the statute for employees aggrieved by adverse actions, unfavorable performance ratings and the like shall be exclusive means by which such persons may vindicate their rights. The Council of the District of Columbia could and perhaps should have so provided, but did not do so. Judges have no authority to correct perceived legislative errors and, if the legislation contains an inadvertent (or intentional) omission, then I think it is up to the Council and not to this court to provide a remedy.

I take it to be conceded for purposes of this appeal that but for the enactment of the CMPA, Ms. Thompson would be entitled to sue the District and Mr. Maury in the Superior Court for defamation and for intentional infliction of emotional distress.¹ If there were no CMPA, she would have the right to a determination by a jury of her peers of

¹The District states in the introduction to its petition that

[f]or the reasons that follow, the [CMPA] should be interpreted as preempting common law actions based on activities that are properly classifiable as personnel actions.

No other contention is made, and my colleagues likewise rely entirely on the CMPA. Maj. op. at note 17; cf. id. at note 24. I therefore do not address in this dissenting opinion the question whether the right to sue the appellants in tort existed prior to the effective date of the CMPA.

the issues of fact. If she prevailed,² she would be entitled to the various remedies available to other plaintiffs who have brought successful tort actions of this kind. The District apparently contends, and my colleagues now agree, that although such a right of action would exist in the absence of the CMPA, it was destroyed as a result of the passage of that statute. I submit that there are profound difficulties with this position and that the disposition urged upon us by the District is legislative rather than judicial in character.

My colleagues concede that there is not a word either in the text of the CMPA or in its legislative history to the effect that the Act's remedies in

²I am not addressing here the merits of these claims. I adhere in this regard to our analysis in Thompson I, 570 A.2d at 289-98.

relation to performance ratings, adverse actions and employee grievances are exclusive, or that common law judicial remedies are to be abolished.³ The legislature's silence on this subject is in stark contract to its enactment of an express exclusivity provision governing disability claims. D.C. Code § 1-614.16(c) (1987) provides:

The liability of the District of Columbia government. . .under this subchapter. . .with respect to the injury or death of an employee, is exclusive and instead of all other liability of the District of Columbia government. . .to the

³See, e.g., Gilmer v. Interstate/Johnson Lane Corp., _____ U.S. _____, 59 U.S.L.W. 4407, 4409 (May 13, 1991) (where legislative intended to exclude or restrict a particular forum for resolving claims, "that intention will be deductible from text or legislative history.") (Citation omitted).

employee. . .in a direct judicial proceeding, [or] in a civil action.

. . .

Obviously, as we noted in Thompson I, supra, 570 A.2d at 289, the Council knew how to make administrative remedies exclusive, and inserted a provision which unambiguously effected that result in one part of the CMPA but omitted it from another part.

"[E]ach part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole." 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05, at 90 (4th ed. 1984 & Cum. Supp. 1990); see Howard v. Riggs Nat'l Bank, 432 A.2d 701, 709 (D.C. 1981). In determining the meaning of a statute, the court must not be guided by a single sentence or part of

a sentence, but must look to the provisions of the enactment as a whole. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). "If. . . comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the act must be construed accordingly. . . ." SUTHERLAND, supra, § 46.05 at 90 (quoting Attorney General v. Sillem, 2 H & C 431, _____, 159 Eng. Rptr. 178 , _____ (1864). More specifically,

[w]here Congress included particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted).

1

The quoted language from Russello fits this case like a glove.⁴

⁴In spite of my colleagues' extensive discussion of the differing origins of the CMPA's disability and adverse action provisions, they cannot and do not deny that, in the language of Russello, the legislature "included particular language in one section of a statute but omit[ted] it in another section of the same act." Id. Surely common sense tells us that the writers or sponsors of the CMPA would probably read their handiwork and notice the stark contrast between the two parts of the enactment. I search the majority opinion in vain for a case that holds that two different sections of the same statute (even a big one) ought not to be compared with one another where this will help to ascertain legislative intent.

In Holt v. United States, 565 A.2d 970, 975 (D.C. 1989) (en banc), on which my colleagues place their reliance for the proper occasion for construction "in pari materia," we observed that

the explicit inclusion of the element of intent to extort in the extortion prohibition with which it was enacted suggests that the legislature knew how to specify such intent if it wished.

(Emphasis added). I suggest that this absolutely unassailable proposition, contained in an opinion which Judge Belson wrote and which Judge Ferren and I joined, has considerable relevance to the present case. If my colleagues will substitute

Application of its principles to the CMPA militates against the notion that an exclusivity provision may be written into the portion of the statute dealing with grievances by judicial "construction" when a legislature which showed elsewhere in the same enactment that it knew exactly how to write such a provision elected not to do so.

Moreover, "[a] statute should not be construed in such a way as to render certain provisions superfluous or insignificant." District of Columbia v. Acme Reporting Co., 530 A.2d 708, 713 (D.C. 1987) (citation omitted); SUTHERLAND, supra, § 46.06 at 104. If the comprehensive character of the CMPA

"exclusivity provision" for "intent to extort" (and change a couple of other contextual words), this well-considered passage from Holt will led them directly to what I view as the correct resolution of the present appeal.

were itself sufficient to render the remedies under the Act exclusive, then the specific exclusivity provision in the part of the statute dealing with disability claims would be superfluous.

The majority's interpretation of the CPA also destroys common law rights, and "[t]he cardinal principle of statutory construction is to save and not to destroy." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). Just as repeals of statutes by implication are not favored, Speyer v. Barry, _____ A.2d _____, No. 88-958, slip op. at 42-44 (D.C. Mar. 29, 1991), so "[n]o statute is to be construed as altering the common law, farther than its words import." Shaw v. Railroad Co., 101 U.S. 557, 565 (1880); Monroe v. Foreman, 540 A.2d 736, 739 (D.C. 1988). This rule is not an absolute one; it does not require "such

an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." Jamison v. Encarnacion, 281 U.S. 635, 640 (1930) (emphasis added); see also Monroe, supra, 540 A. 2d at 739 (quoting Jamison). In my opinion, however, it cannot reasonably be contended that an obvious legislative purpose of the CMPA was to preempt common law tort remedies, or that the legislature plainly intended such a result. Indeed, our unanimous initial rejection of that notion seems to me to demonstrate that its rectitude is less than plain or obvious.⁵

⁵I agree with the majority that the CMPA "plainly" provides for a comprehensive system of administrative review of employer actions, as well as for judicial review. What it does not provide, plainly obscurely, or at all, is that the aggrieved employee cannot go to court instead. If that is what the drafters intended, then we are confronted, in Churchill's phrase, with a "riddle

The District relies on two separate lines of authority in support of its interpretation of the CMPA, but neither sustains its position. First, it cites cases like David v. United States, 820 F.2d 1038, 1043 (9th Cir. 1987), in which a federal employee's action against her supervisors for intentional infliction of emotional distress was held to be "a common-law cause of action which is preempted by the CSRA" (the federal Civil Service Reform Act). The court did not discuss the reasons for its holding, but cited its previous decision in Lehman v. Morrissey, 779 F.2d 526 (9th Cir. 1985) (per curiam). In Lehman, the court explicitly stated that the result it reached on analogous facts was based exclusively on federal preemption

wrapped in a mystery inside an enigma" as to why they did not say so.

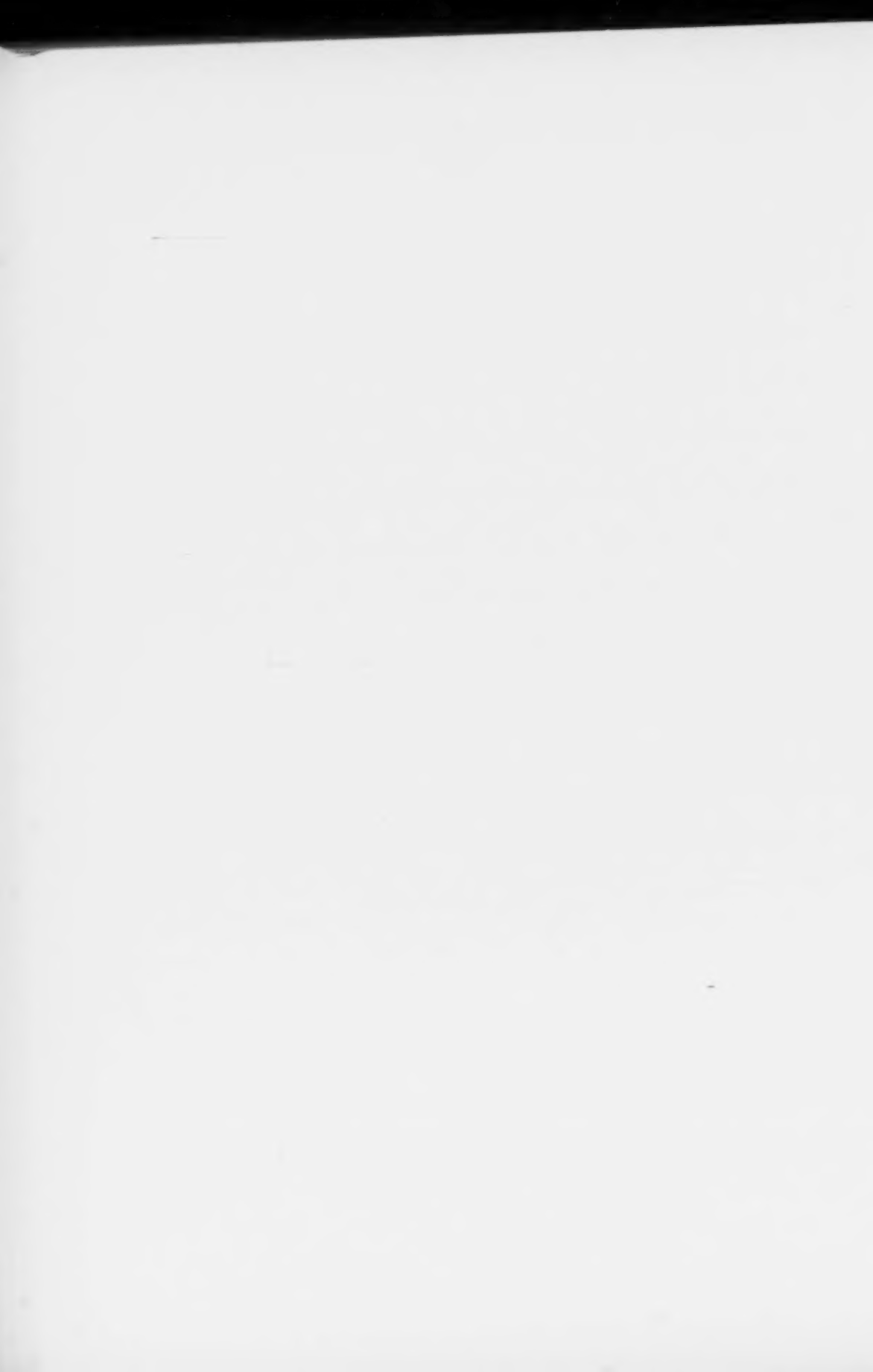
doctrine. Id. at 526-27 n.1. In Broughton v. Courtney, 861 F.2d 639 (11th Cir. 1988), also cited by the District, the court likewise unambiguously predicated a similar decision on identical principles.⁶ As we correctly pointed out in our original opinion in Thompson I, 570 A.2d at 289 & n.9, this doctrine is not applicable in the present case. It is one thing to infer that Congress did not intend to countenance state law remedies when it enacted preemptive legislation governing the rights of federal employees, and quite another to scribe to the District's legislature an intention to destroy common law rights in the absence of any

⁶"[T]he fact that giving preemptive effect to a federal statute would leave an individual without a remedy does not mean that Congress did not intend to preempt state law." Broughton, supra, 861 F.2d at 643 (citing Howard v. Parisian, Inc., 807 F.2d 1560, 1565 (11th Cir. 1987)).

conflict or collision with federal statutory policy.

The District also relies on Bush v. Lucas, 462 U.S. 367 (1987), and on other decisions which follow that case.⁷ In Bush, an employee of the National Aeronautics and Space Administration who claimed to have been demoted in retaliation for public criticism of his agency asked the Supreme Court "to authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors." Id. at 368. The Supreme Court unanimously rejected that invitation to judicial activism:

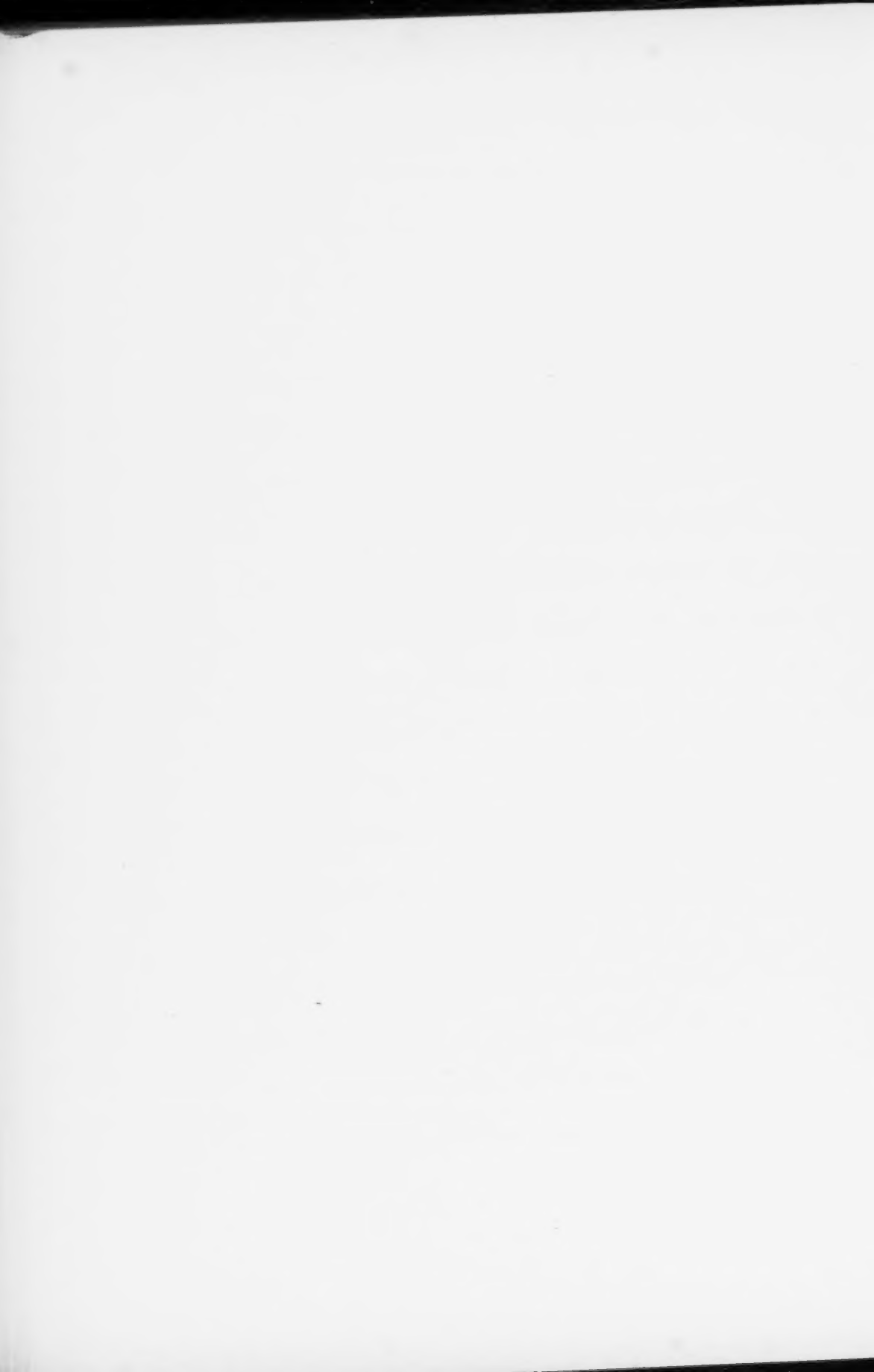
⁷See e.g., Karachalios v. National Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 536 (1989); Spagnola v. Mathis, 273 U.S. app D.C. 247, 253 N.10, 859 F.2d 223, 229 n.10 (1988) (per curiam) (en banc).



Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy.

Id. (emphasis added). Observing that Congress could have created such a remedy but did not do so, the Court declined to "create a new substantive legal liability without legislative aid and as at the common law." Id. at 390 (emphasis added) (quoting United States v. Standard Oil Co., 332 U.S. 301, 302 (1947)). The Court recognized that

[t]he selection of that policy which is most advantageous to the whole involves a host of considerations

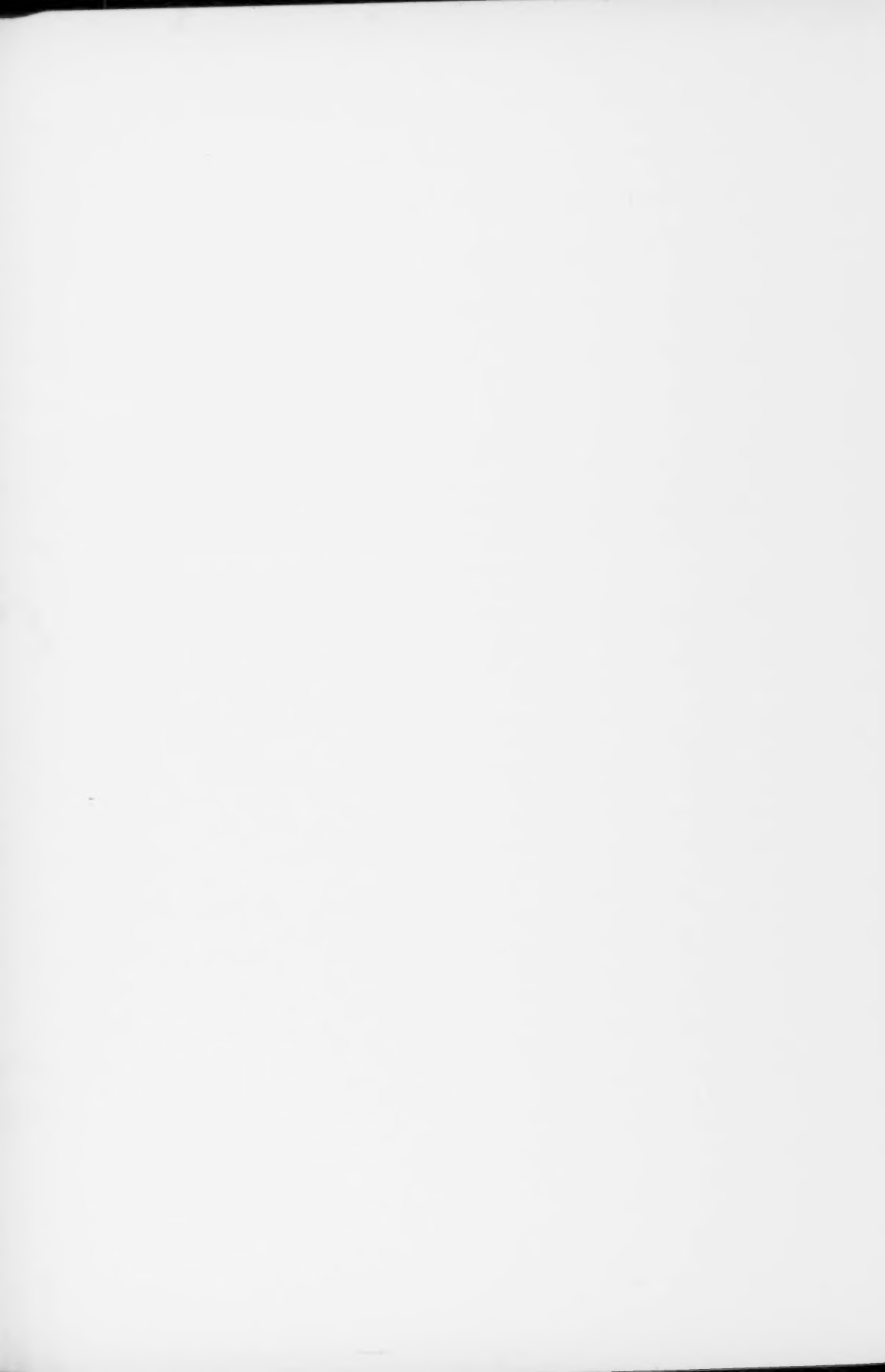


that must be weighed and appraised.
That function is more appropriately
for those who write the laws, rather
than for those who interpret them.

Id. at 380 (quoting United States v. Gilman, 347 U.S. 507, 511-13 (1954)).⁸

⁸The majority also relies on United States v. Fausto, 484 U.S. 439 (1988), in which a sharply divided Supreme Court held that the CSRA precludes review of certain adverse personnel actions under the Back Pay Act. The Court explained that its decision was not at odds with the presumption against implicit repeals of legislation, for the Back Pay Act was being left intact and the Court was overruling only "a legal disposition implied by [the] statutory text." id. at 453. In the present case, the construction urged upon us by the District abrogates altogether the common law rights and remedies of District employees to sue in tort in situations of this kind.

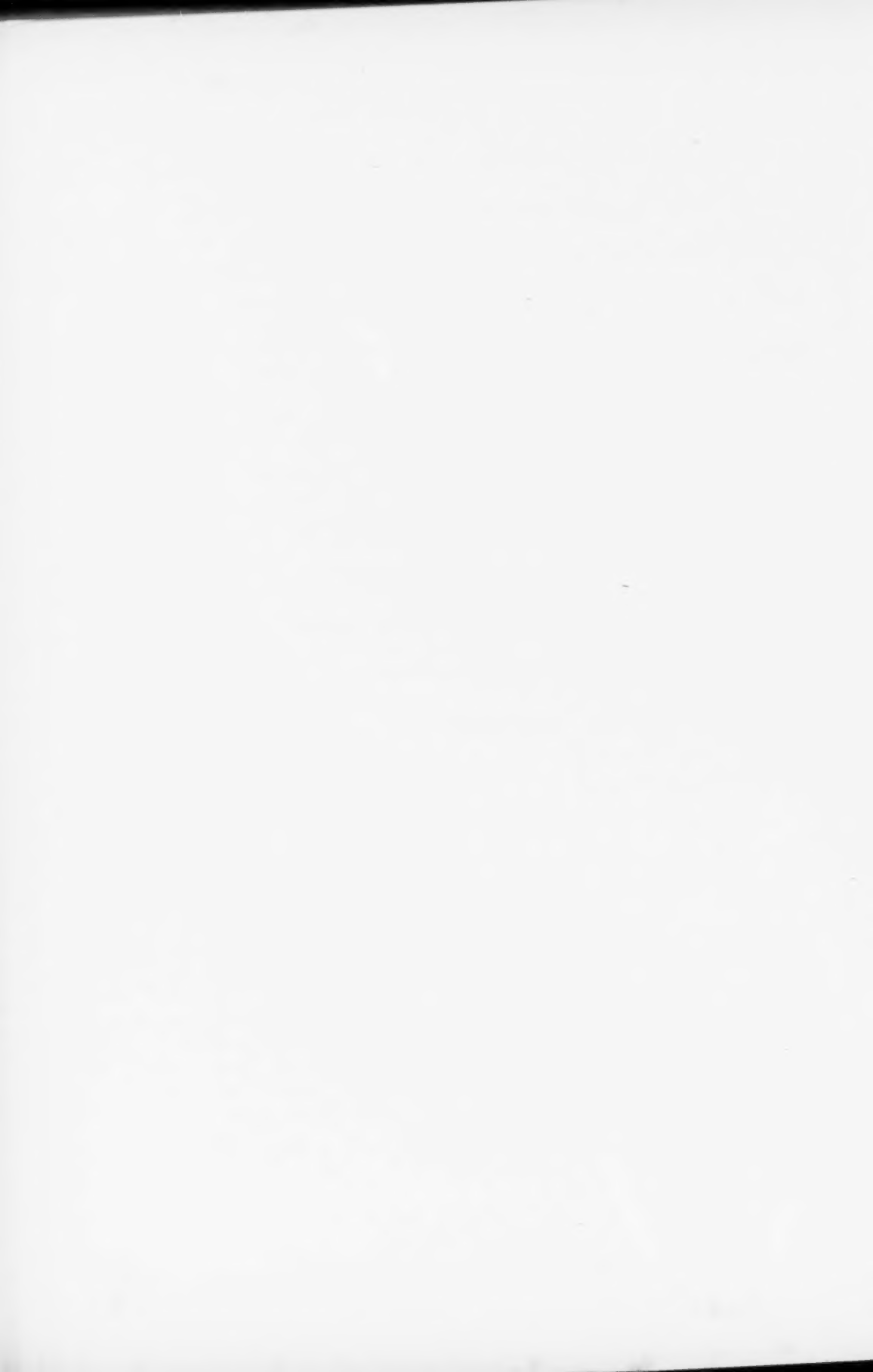
My colleagues also say that it is "interesting to note" that in Fausto, "no one sought to argue against such preclusion by citing the absence of an exclusivity provision, in contrast with the presence of an exclusivity provision in FECA. . . ." Maj. op. at note 20. However interesting this may be, it has absolutely no precedential significance. As the Supreme Court explained Webster v. Fall, 266 U.S. 507, 511 (1925),



The present case is the converse of Bush. Here, the court is not being asked to create a new non-statutory remedy which the legislature has failed to provide. Rather, the District is demanding that we do for it what the Council has failed to do, namely, to abolish a common law right of action. The same canons of judicial self-restraint which persuaded the Court not to conjure up a new right and judicial remedy in Bush should lead us to eschew the destruction of common law rights by

[t]he most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

In fact, Judge Ferren was a member of the unanimous division which quoted most of this language with approval, and followed its dictates, in Thompson v. United States, 546 A.2d 414, 423 n. 14 (D.C. 1988).



judicial fiat. Construction is not legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." Kirschbaum Co. v. Walling, 316 U.S. 517, 522 (1942).

The District argues that the costs associated with the continued availability of common law remedies are substantial and would undermine CMPA's merit personnel system. The majority disagrees with the District, but discerns a somewhat different problem:

we do agree that the burdens of an employers's having to anticipate and deal with two, often substantially different remedial systems (one of them protracted litigation) available at the election of each employee are likely to have a chilling effect on mandated and

bargained personnel procedures--an effect that could debilitate the very foundation of the merit personnel system.

Maj. op at 28. In other words, the District and my colleagues think the statute has not worked well or will not work well unless we write into it what the Council left out. As Justice Frankfurter explained for the Court in Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617 (1944), however, it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. The natural meaning of the words cannot be displaced by reference to difficulties in administration.

(Citation and internal quotation marks omitted).

The majority has effectively marshalled the arguments against the co-existence of judicial and administrative remedies in this sensitive field. I respect the view that ambiguities in legislation should, if possible, be resolved in a manner which will avoid unreasonable or inequitable results. I do not think, however, that invocation of such a principle will support our reading into the CMPA something that the Council could have written but did not write. The District's policy arguments may well be persuasive, but they are directed to the wrong forum. They call for a legislative remedy, not a judicial one. I therefore adhere to our initial resolution of this appeal. _

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 86-1051 & 86-1631

District of Columbia, et al.,

Appellants,

CA10483-83

v.

Patricia Joan Thompson,

Appellee.

BEFORE: Rogers, Chief Judge; Newman,
*Ferren, *Belson, Terry, Steadman,
*Schwelb, Farrell, and Wagner, Associate
Judges.

O R D E R

On consideration of appellants' petition for rehearing or rehearing en banc and appellee's petition for rehearing en banc, it is

ORDERED by the merits division* that appellants' petition for rehearing is granted. The parties are directed to file supplemental briefs on the issues raised in appellants' petition for rehearing on or before October 31, 1990. At the discretion of the court, the Clerk

shall schedule these cases for argument after the supplemental briefs are filed with this court. It appearing that no judge of this court has called for a vote on the petitions for rehearing en banc, it is

FURTHER ORDERED that the petitions for rehearing en banc are denied.

PER CURIAM

Copies to:

Honorable William S. Thompson

Clerk, Superior Court

Charles L. Reischel, Esquire
Deputy Corporation Counsel

Joseph P. Hart, Esquire
1818 N Street, N.W.
West Lobby
Washington, D.C. 20036

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 86-1051 & 86-1681

District of Columbia

and

Alfred Maury, Appellants,

v.

Patricia Joan Thompson, Appellee.

Appeal from the Superior Court of the
District of Columbia

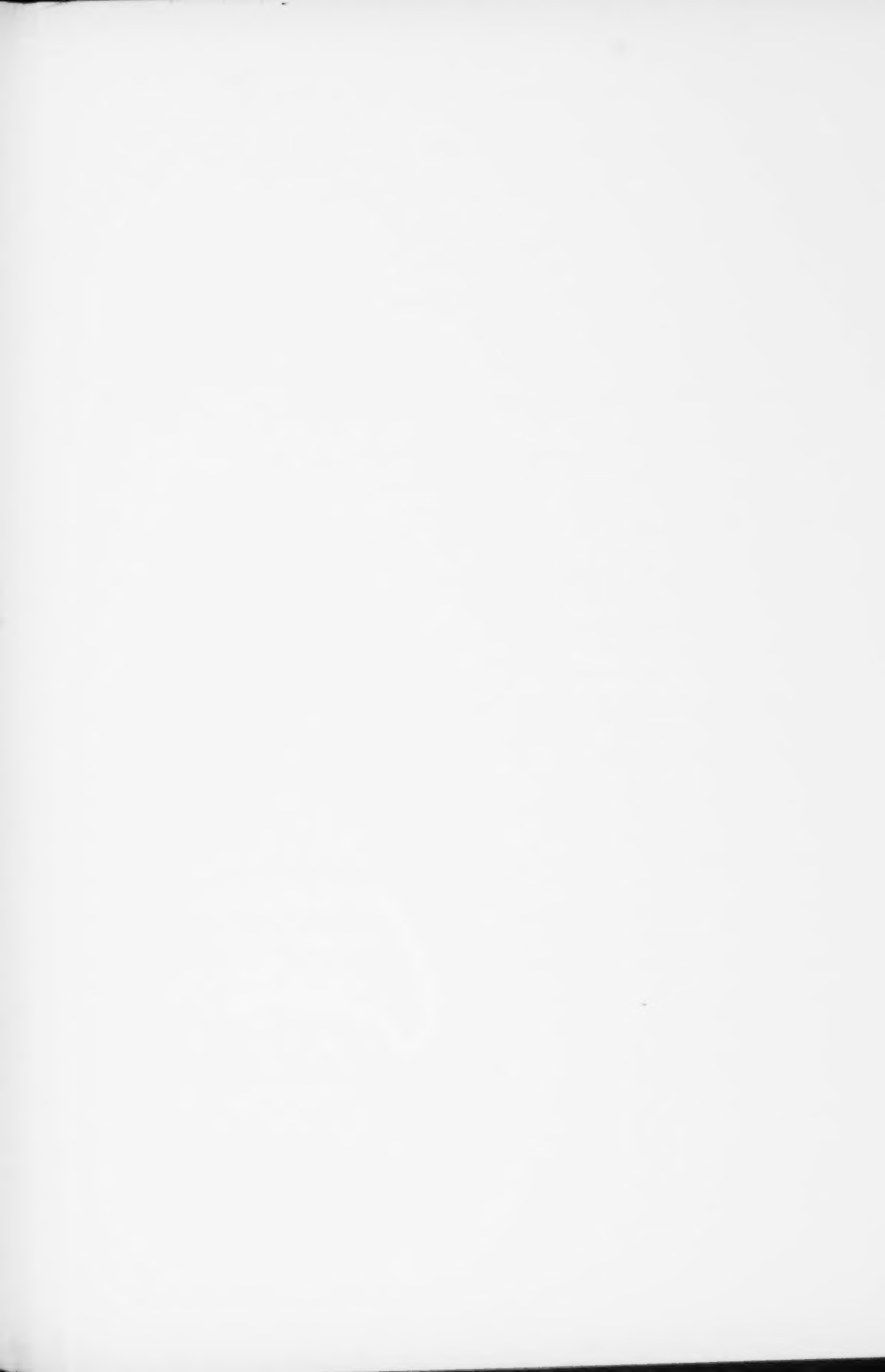
(Hon. William S. Thompson, Trial Judge)

(Argued February 23, 1989)

(Decided February 12, 1990)

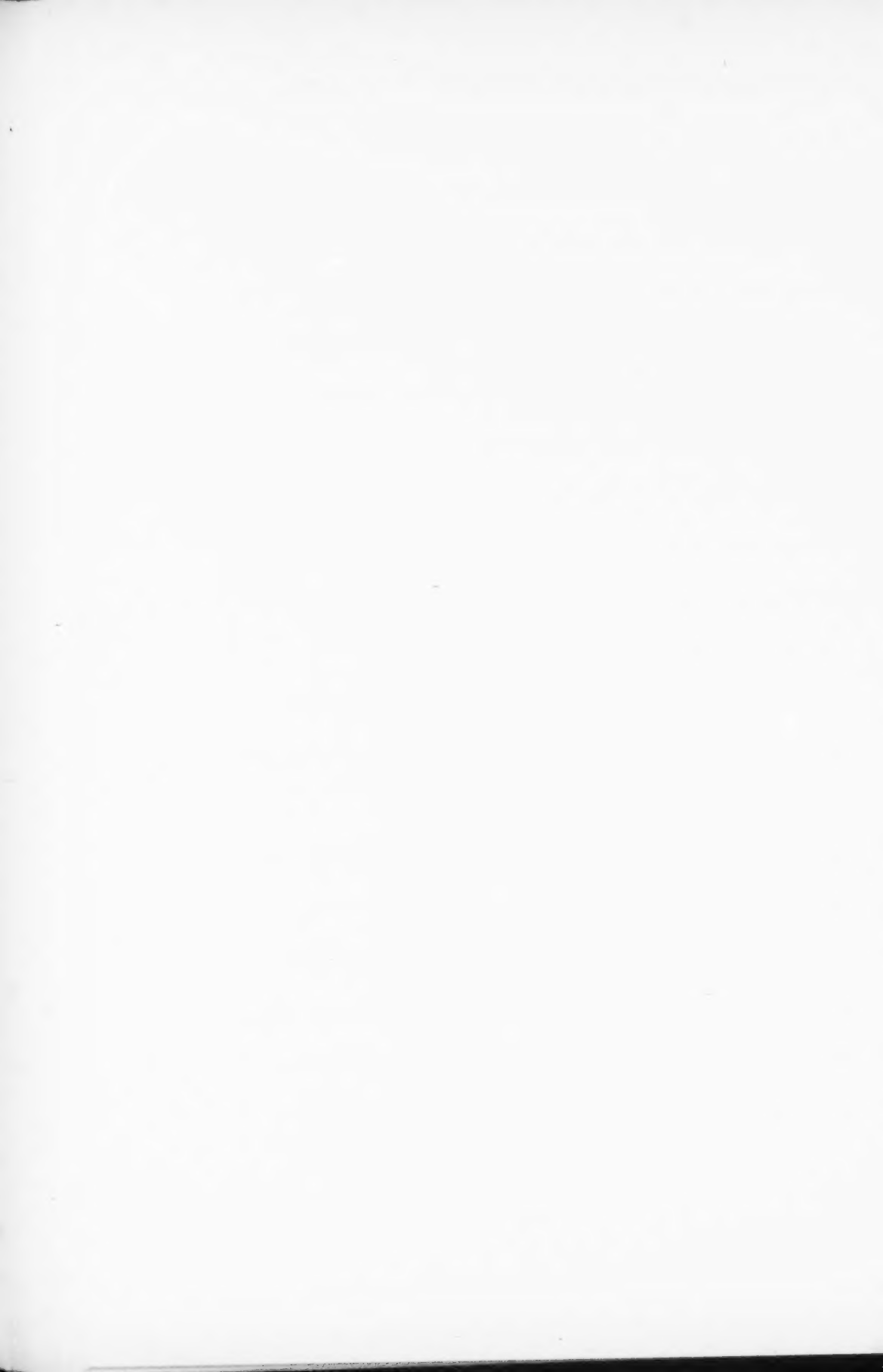
Donna M. Murasky, Assistant
Corporation Counsel, with whom Frederick
D. Cooke, Jr., Corporation Counsel at the
time the brief was filed, and Charles L.
Reischel, Deputy Corporation Counsel,
were on the brief, for appellants.

Joseph P. Hart, with whom James L.
Coffin and Robert E. Glenn, were on the
brief for appellee.



Before FERREN, BELSON, and SCHWELB,
Associate Judges..

FERREN, Associate Judge: This case arose out of an employment dispute between appellee, Patricia Thompson, who was a library technician in the Northeast branch of the District of Columbia Public Library, and her supervisor, appellant Alfred Maury. Effective August 5, 1983, Thompson was fired. Thompson's notice of proposed discharge stated the reason as "Discourteous Treatment of your Supervisor," referring to an incident on May 25 in which Maury and Thompson each claimed an assault by the other. The notice described Thompson's assault of Maury, as well as other instances in which Maury had corrected Thompson's behavior and Thompson had responded in a "hostile, discourteous manner" with threats and name calling. In response to



losing her job, Thompson filed suit against Maury and the District of Columbia. In her complaint, she described her version of the incident on May 25 and claimed Maury's actions constituted assault and battery and false imprisonment. Thompson also claimed that, because Maury's statements giving his version of the incident were false, his statements were defamatory. Thompson further alleged that Maury's "multivalent tortious actions" constituted intentional infliction of emotional distress. Thompson sued the District under the doctrine of respondeat superior.¹ Maury counterclaimed for assault and battery.

While Thompson's complaint appeared to be limited to the events surrounding

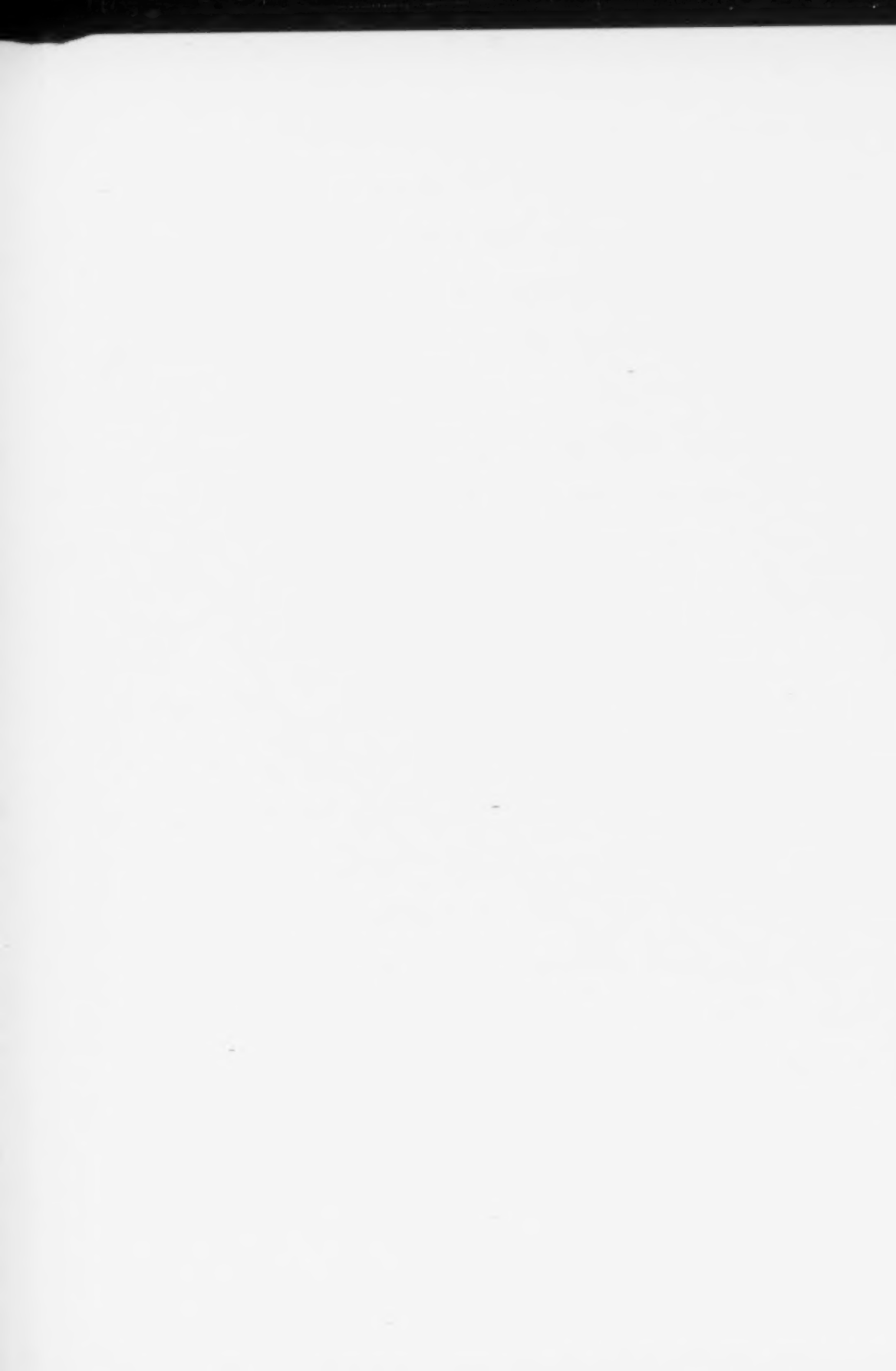
¹Thompson also brought a count for negligent hiring and training by the District of Columbia, which she withdrew at the close of her evidence.

the May 25 incident, the facts developed at trial were much more far-reaching. Thompson put into evidence her entire career with the library, both to show that she had been a satisfactory employee before her transfer to Northeast and to show Maury's treatment of her at Northeast. Thompson, for example, put into evidence twenty-two memoranda Maury had written about her. Thompson's attorney then argued to the jury that Maury had acted on a mission to have Thompson dismissed from the library, that Maury's entire pattern of behavior for two years had constituted intentional infliction of emotional distress, and that Maury had slandered and libeled Thompson for two years.

The jury found for Thompson on all counts, except on her claim of false imprisonment, and against Maury on his

counterclaim. The jury awarded Thompson damages (excluding loss of wages and benefits) of \$530 for the assault, \$35,000 for defamation, and \$42,500 for intentional infliction of emotional distress. The jury also awarded Thompson \$280,000 for loss of wages or diminished earning capacity attributable either to the defamation or to the intentional infliction of emotional distress.

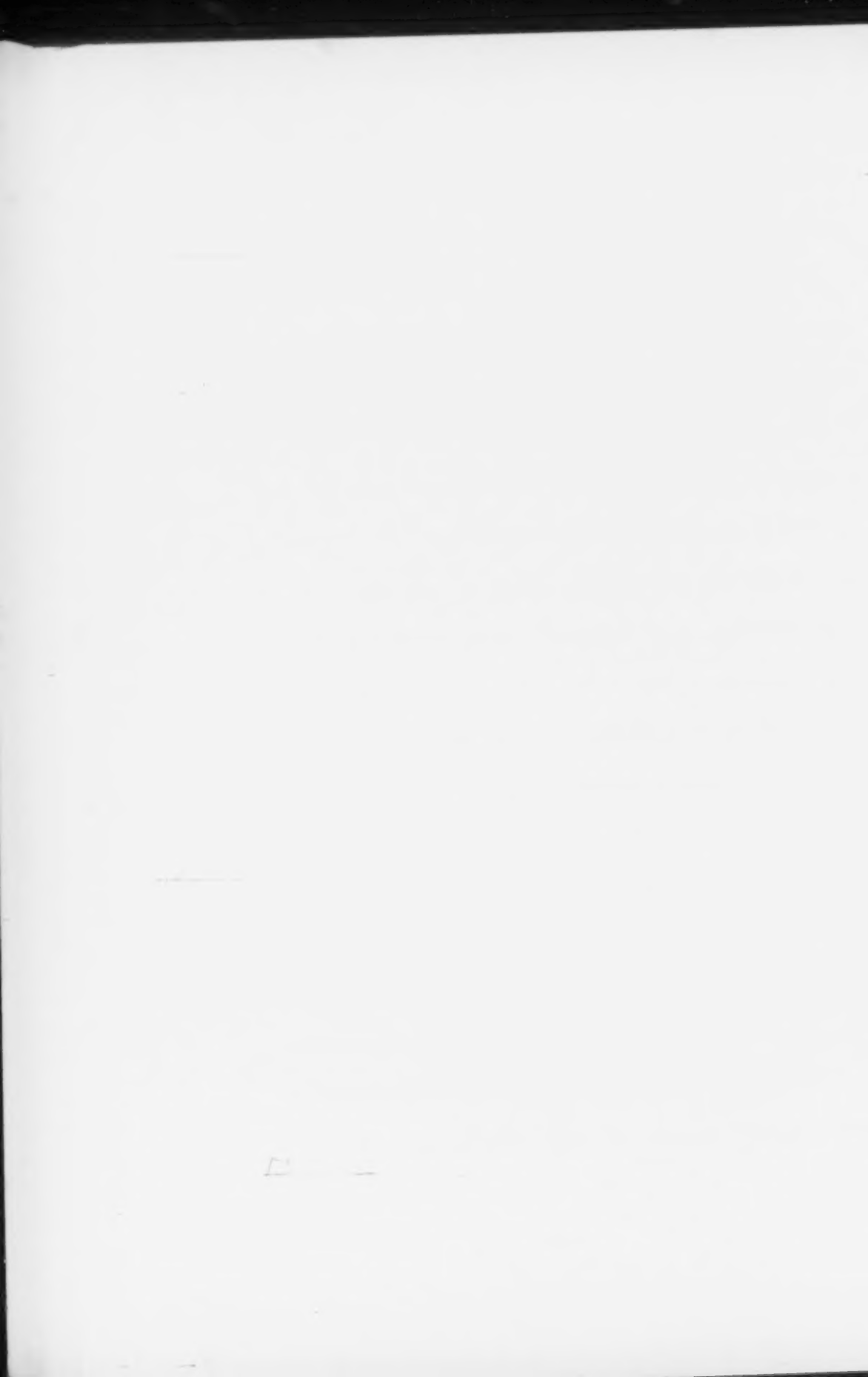
Maury and the District filed this appeal, arguing primarily that (1) Thompson's claims were covered by the disability compensation provisions of the Comprehensive Merit Personnel act, D.C. Code §§ 1-624.1 to -624.46 (1987), and, therefore, that Thompson was required to submit them initially to the District of Columbia Department of Employment Services (DOES), which had primary jurisdiction; (2) Thompson had otherwise



impermissibly attempted to litigate her discharge, which was limited to an administrative remedy or, at least, to exhaustion of administrative remedies; (3) Maury's actions did not constitute intentional infliction of emotional distress as a matter of law; (4) with respect to the alleged defamation, Maury was absolutely privileged to make the statements about Thompson; and (5) as to the claims for assault and battery and defamation, the trial judge erred in excluding evidence of Thompson's prior assaults and threats, as well as evidence of Maury's good character. We agree with Maury's and the District's first, third, and fifth claims of error. Accordingly, we must reverse and remand.

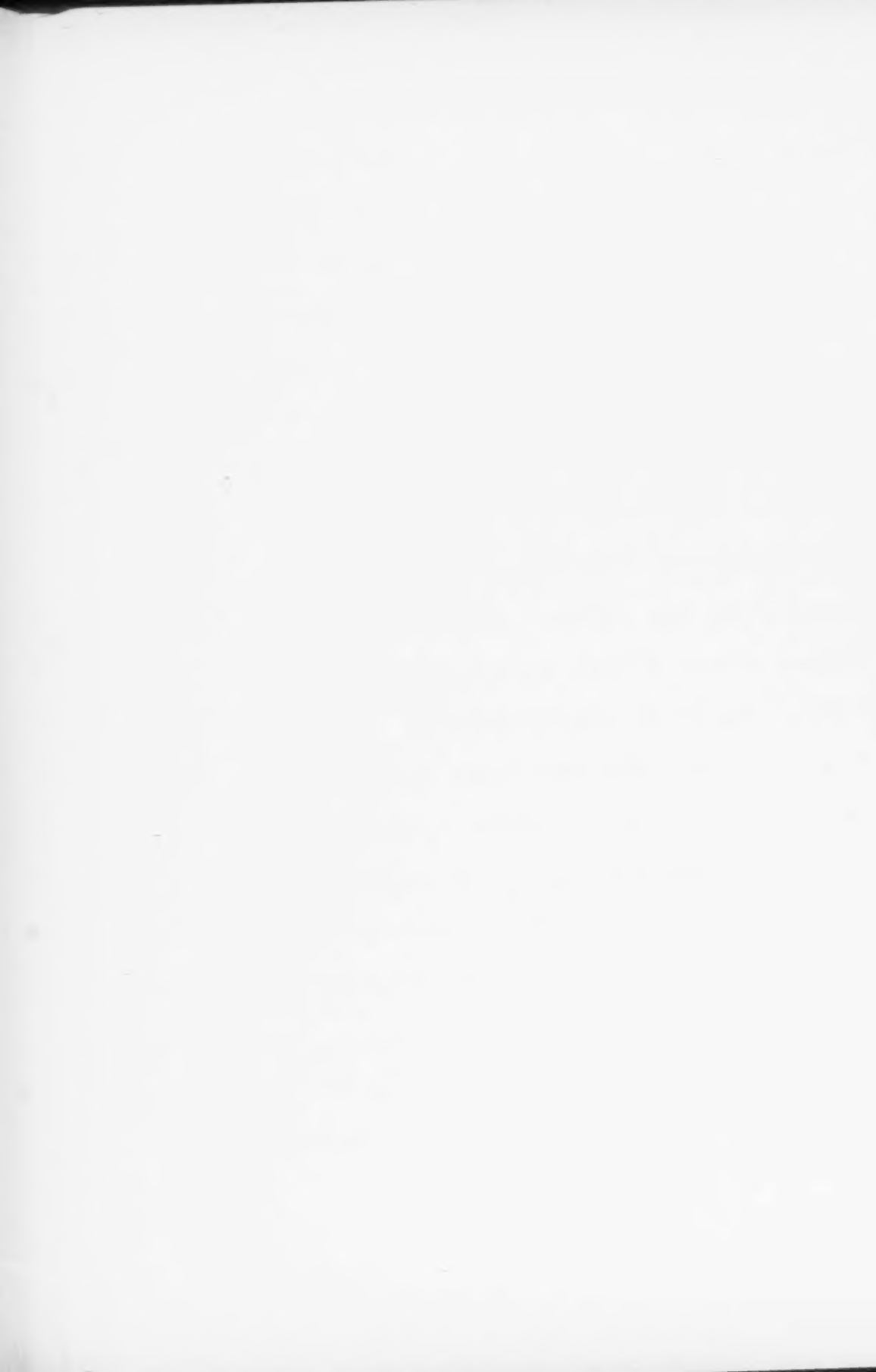
I.

Patricia Thompson began working in the main branch of the District of



Columbia Public Library on a part-time basis in 1973. In 1978, she was promoted one grade level and began working full time. In 1979, she was transferred to the Wilkinson branch and then to the Chevy Chase branch. In July 1980, she was transferred to the Benning branch. While at Benning, on January 26, 1981, Thompson underwent cataract surgery on her right eye. She was out for ten weeks. On her return, in March, her doctor wrote a note stating that Thompson could return to work from 1:00 p.m. to 7:00 p.m. for the next four weeks. On April 26, her doctor wrote another note, again recommending the same limited hours. In May 1981, Thompson was transferred to the Northeast branch, where Maury began supervising her.

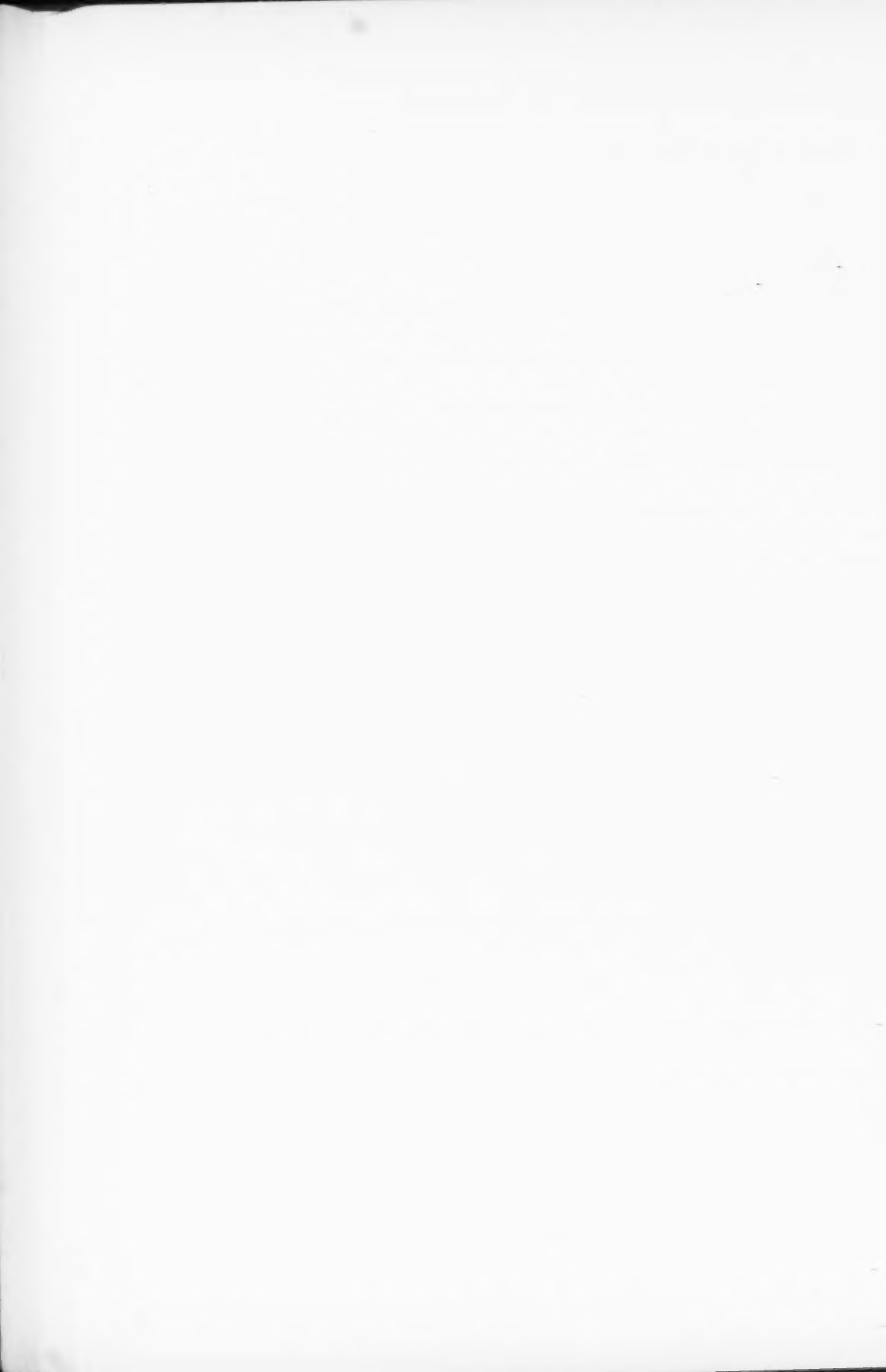
The parties differ sharply over Thompson's record at the Library before



and after her transfer to the Northeast branch. Thompson characterized her tenure with the Library as satisfactory until she arrived at the Northeast branch. Thompson noted, for example, that she regularly received in-grade step increases, which are automatic raises the employee receives on her anniversary date if the supervisor approves. In addition, Thompson was promoted once and, because of her supervisor's recommendations, began working more hours and finally full time. Thompson also characterized her performance evaluations as satisfactory.

In contrast, the District and Maury put on evidence showing that Thompson had not had a wholly satisfactory relationship with the Library before her transfer to Northeast. Thompson had previously complained about her supervisors and about problems with

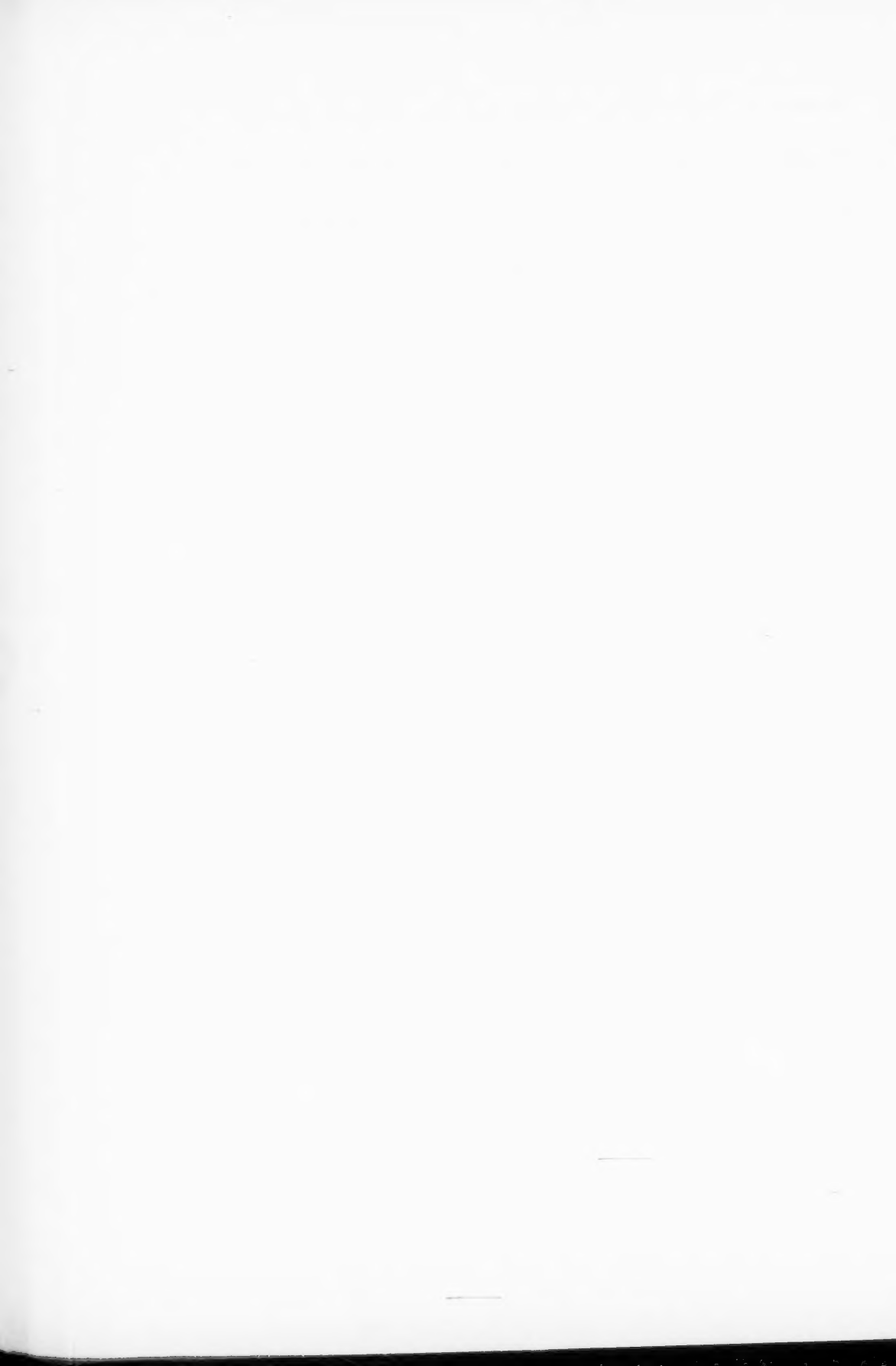
employees at the other branches. Her supervisor at the Benning branch testified that she had had periods of difficulty supervising Thompson because Thompson had had difficulties dealing with her co-workers and the public. Thompson had lost her temper with members of the public and had had arguments in which she swore at her co-workers. In addition, Thompson took a lot of leave time. Usually Thompson took sick leave, but sometimes Thompson would anticipate leaving and yet not let her supervisor know that she was planning to take leave. Thompson received one poor review while at Benning that she refused to sign. When her supervisor gave her the review, Thompson became angry, used profanity, and knocked the contents of the top of her own desk to the floor.



The main dispute at trial concerned Thompson's tenure at the Northeast branch. Thompson put in evidence twenty-two memoranda that Maury had written about Thompson during her two years at Northeast. These memoranda, beginning in June 1981, repeatedly advised and warned her to follow the correct leave request procedures and notified her of problems in the performance of her duties, including conflicts with a summer employee, inaccuracy in putting information into the computer, and insubordination and rudeness to staff and patrons. Thompson claimed that all these memoranda were false, that they defamed her, and that, by writing the memoranda and harassing her, Maury intentionally had inflicted emotional distress. Thompson testified that some of the memoranda blamed her for not doing tasks

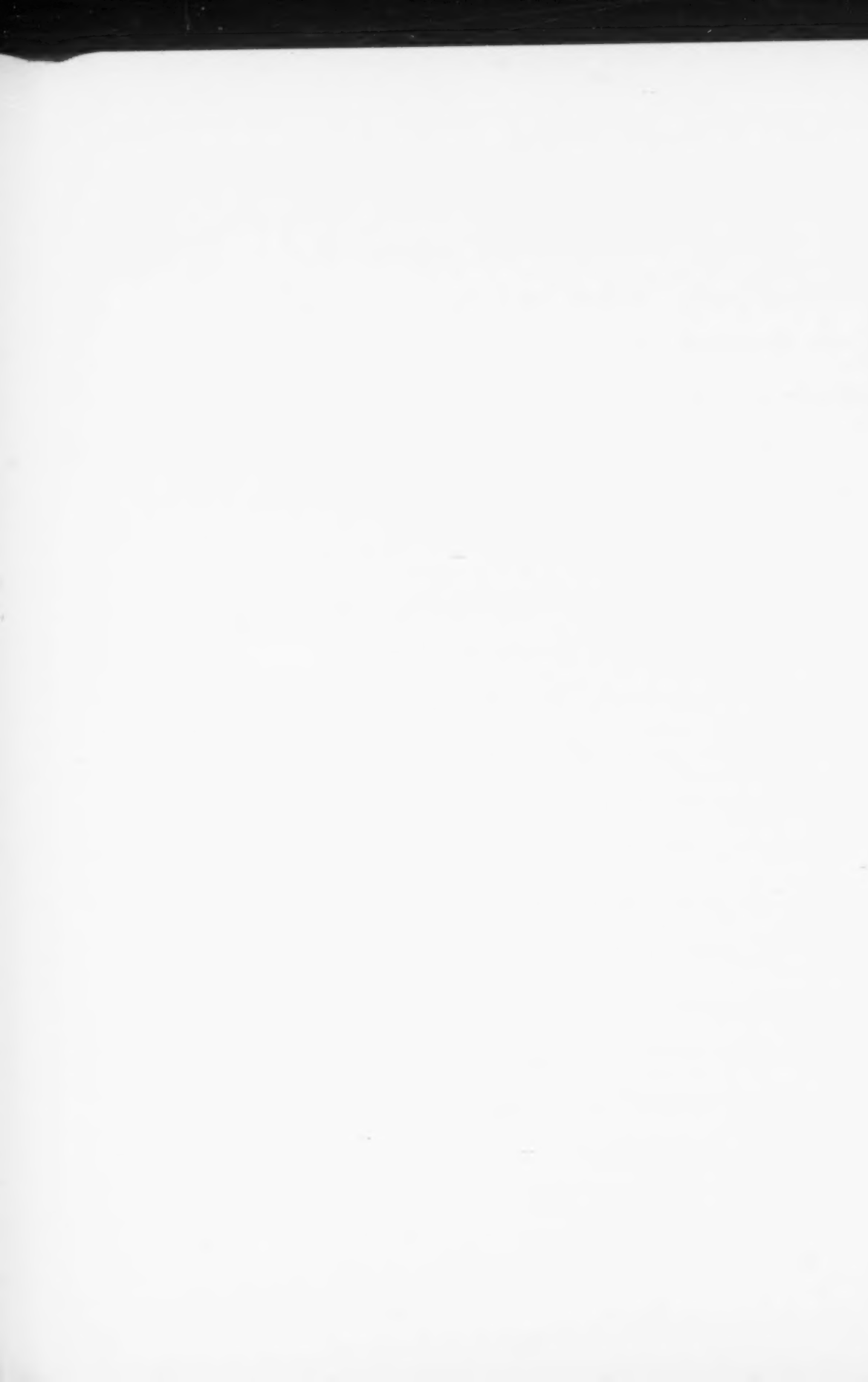
when she either had been told not to do them or had been asked to do other work. Thompson also testified that some of the memoranda either mischaracterized her disputes with Maury or were absolutely false. She felt some of the other memoranda were excessively critical, and she said they contained complaints that Maury had not told her in person.

At trial, Maury defended the accuracy of these memoranda. Maury testified that during Thompson's two years at the Northeast branch he had had two to four problems per week with her. Maury stated that he had discussed the problems in person with Thompson and tried to learn her side each time. He said he finally had started writing memoranda because he was required to do so as a supervisor. These memoranda, contemplated by the union contract, were



either "letters of warning," meant to correct the employee, or "letters of direction," more strongly worded corrections. Maury testified that he did not document all the problems with Thompson in these memoranda.

Althea Neal, Thompson's direct supervisor at the Northeast branch, supported Maury's testimony. She stated that problems with Thompson had begun shortly after her arrival. Thompson kept repeating mistakes in entering information into the computer and cursed Neal whenever Neal called the mistakes to Thompson's attention. According to Neal, Thompson also took excessive leave, as much as four days per week, without requesting it in advance. Neal received complaints from library patrons about Thompson, and Thompson did not get along with her co-workers.



The incidents underlying some of the memoranda were discussed extensively at trial. The first memorandum referred to a meeting Maury had called in response to complaints by other staff members.

Maury, Neal, Thompson, and Ernest Dixon (another library employee) met to discuss problems in the allocation of library tasks. According to Maury's testimony, during the course of the meeting Thompson began verbally abusing Neal, calling her a liar and other names. As a result of this meeting, Maury recommended that Thompson be transferred or dismissed, a recommendation that did not result in any personnel action. Thompson also testified about the meeting, denying that she had refused to do work or that she had come back late from breaks and lunch. She admitted calling Neal a liar but denied calling her other names. Thompson

further testified that the meeting had ended when she told Maury that he was creating conflicts among the employees and that, as far as she was concerned, the meeting was over.

Thompson became eligible for a within-grade step increase in August 1981. While Maury recommended the increase, he also wrote a memorandum to the personnel department that Thompson's performance was barely satisfactory and that further documentation would show Thompson was "certifiably unsatisfactory." Thompson testified that she had never received a copy of this additional memorandum and that Maury was supposed to have shown her the recommendation.

A continuing source of controversy was Thompson's leave-taking. During her time at the Northeast branch, Thompson

continued to work limited hours because of her eye condition. The reduction in her working hours counted as sick leave. Thompson testified that Maury had told her he could give her annual leave on the same day she requested it but that Maury, nonetheless, had written Thompson several memoranda about the need for requesting annual leave in advance to aid scheduling. Thompson also testified that Maury continued to be insensitive to her eye condition. One example of this insensitivity, she said, occurred when Thompson was assigned to work at another branch. She took sick leave because of her eye condition, but Maury reported her as absent without leave. Thompson wrote a memorandum to personnel stating she had called in and requested sick leave for that day. Her request had been granted, and no action was taken against her.

Maury and Neal testified, in contrast, that Thompson's leave-taking made scheduling at the library difficult. Thompson would call and say she was taking the time off that day. Maury tried to accommodate Thompson's sick time, approving the leave when she asked for it, but he began writing "letters of direction" when he, himself, received word from his superiors to tighten up on leave time. (Thompson acknowledged on cross-examination that she took eighteen weeks of leave during 1981 and fourteen weeks of leave during 1982 while at Northeast.) Maury further testified that he wrote the memorandum reporting Thompson as absent without leave only after hearing from the supervisor at the other branch that Thompson did not show up or call to ask for leave.

In May 1982, Thompson filed a grievance with the union requesting a computer test to show that she had the necessary skills to be promoted one grade level. In 1981, Thompson had received the Library's standard computer training program, and by mid-1982 she felt her computer skills qualified her to advance. At a grievance hearing on May 11, 1982, Maury testified, as he did later at trial, that he did not think a computer test was appropriate because his branch was short of staff and because Thompson's past behavioral problems meant that an additional test and, if necessary, further training would not help Thompson get promoted. Maury also testified that Thompson became so abusive at the hearing that she had to be removed from the building. After the hearing, according to Maury, Thompson announced that she did

not feel well. She took the rest of the day off and the next day off as well. Maury testified that he approved one day of leave but not the second day. On May 12, 1982, Maury wrote a memorandum to personnel explaining that he had decided not to give Thompson a computer test because of her "uncontrollable emotions" and the fact that she was not promotable at that time. He also sent Thompson a "letter of direction" on that date warning her against taking leave without prior permission and disapproving her leave for May 12. He later changed her time off on May 12 to absence without leave.

Thompson testified at trial that she had felt she was qualified for a grade increase but that Maury had been stalling in approving her promotion. The hearing had made her very upset, she said, and

had given her a migraine headache. Contrary to Maury's testimony, Thompson testified that Maury had approved leave for both days and even had said that if she did not have enough leave time, she could take the time without pay.

In September 1982, Thompson filed a complaint with the Equal Employment Opportunity Office requesting computer training. Dorothy Gray, who was the personnel officer assigned to the complaint, suggested that Neal give Thompson some additional training. Maury opposed the request because Neal had been temporarily transferred to another branch and because of other problems, including Thompson's rudeness and abuse of leave-taking.

As part of the regular library procedure required by the union contract, Thompson received annual performance



evaluations. Her first performance rating at the Northeast branch in April 1982, for the period covering April 1981 to March 1982, had been mixed, with some checks for "satisfactory" and some minuses for "needs improvement." At the end of December 1982, Maury sent Thompson a "warning of unsatisfactory performance rating." This warning was a notice, required by the union contract, sent at least ninety days before the employee received an unsatisfactory rating which could then become the basis of adverse action. In this warning letter, Maury detailed the reasons for the unsatisfactory rating: problems of rudeness to patrons, inaccuracies in putting information into the computer, refusal to do assigned duties, and inappropriate leave-taking. Thompson sent a memorandum to personnel disputing



the unsatisfactory evaluation. She also testified that, although Maury was supposed to help her improve her performance if it needed improvement, he never did so during her two years at the Northeast branch. Maury was unknowledgeable about the computer, she said, and, rather than help her, he wrote memoranda criticizing her. Thompson further testified that Maury also had refused to send her to another branch to improve her skills.

In May 1983, Maury and Thompson had the altercation that led to Thompson's being fired. On May 24, Maury gave Thompson a "letter of warning" about incorrect leave-taking. The next day, Thompson saw Maury as he entered the library. Maury testified that Thompson, who was angry about the letter, confronted him. She shouted at him,



called him names, and finally threw a rubber stamp at him. He testified that he left the area and that Thompson followed him to his mezzanine office, shouting at him, blocking the door, and pushing his shoulders back when he tried to pass. Maury denied touching or pushing Thompson on May 25.

Thompson testified that, on May 25, she asked Maury about the "letter of warning" and that he insulted her. She told him to "lay off me" and went to the kitchen. She further testified that he followed her there and blocked the door. Then, said Thompson, after she left, Maury followed her to the mezzanine where he shouted and pointed his finger at her. Thompson testified that when she told Maury to stop harassing her, he pushed her against the wall. According to Thompson, after she left, Maury followed

her downstairs and pointed his finger at her again, saying, "There's more where that comes from, baby." Thompson testified that, as a result of this incident, she was very upset and had sharp back pains that required her to take two days off and to go to the hospital for treatment.

After the altercation, both Maury and Thompson called Sigrid Washington, Maury's direct supervisor. Maury got through to Washington and recounted Thompson's assault on him. Thompson was unable to get through to Washington but did speak to June Sweeney, Washington's supervisor. Sweeney came to the Northeast branch and discussed the incident with Washington, Maury, and Thompson. As a result of the discussion, Maury wrote a memorandum to Washington explaining his version of the events and

recommending that Thompson be dismissed. Thompson wrote a memorandum to Sweeney explaining her version of the events and threatening to seek professional advice if the library did not "handle the matter." Washington and Sweeney, however, concurred in Maury's recommendation to fire Thompson.

On June 20, 1983, Thompson received her last performance evaluation. It rated her unsatisfactory. Thompson refused to sign it. Thompson testified that she felt deceived, destroyed, and taken advantage of by the report. She testified that, after receiving the report, she went to a psychiatrist because she had trouble coping with the assault and the rating. Thompson filed an objection to her unsatisfactory performance evaluation and requested an impartial review. Later in June 1983,

Sweeney acted as the impartial reviewer. Sweeney asked Thompson specific questions about her job duties, such as how to operate the computer. Sweeney concluded that Thompson could not adequately perform her job duties and, therefore, that the unsatisfactory rating should stand.

On June 22, 1983, Thompson received a proposed notice of discharge. This letter gave Thompson a thirty-day notice that she would be terminated and explained her appeal rights. The letter stated the reason for termination as "Discourteous Treatment of your Supervisor." The letter described Thompson's assault of Maury, as well as an earlier incident in which Thompson had threatened Maury. The letter also stated that, as to the penalty, Thompson's past record of threats, outbursts, and

discourteous behavior had been considered. Thompson testified that she was in shock because the library took Maury's side of the events without getting her version. Thompson grieved this termination through her union, but the termination was upheld.

Thompson testified that after she was fired she had trouble holding another job. She did not work continuously because she had flashbacks of Maury's assault on her and because she cried a lot. When she could not work, she sat around the house, gained weight, drank, and separated herself from friends and family.

At trial, Thompson called Dr. Francis Board, a psychiatrist, to testify as to the ongoing mental effects she suffered. He testified that Thompson suffered from a "major affective



disorder." While he opined that she had partially recovered from this disorder by October 1985, he stated that the prospects for Thompson's future recovery were "guarded." Thompson also called Joseph Tryon, an economist, who testified about Thompson's lost income. Tryon compared Thompson's current income, projected over her expected working life, to what he estimated she would have earned in the library system. He then discounted the difference by an interest rate of six percent. In his opinion, her lost income, discounted to its net present value, was \$291,453.

The District also put on evidence of Thompson's mental condition. Dr. Thomas Goldman testified that, at the time of her discharge, Thompson suffered from an "adjustment disorder with a mixed disturbance of emotions and conduct." He



disagreed with Dr. Board that Thompson suffered form a "major affective disorder." According to Dr. Goldman, Thompson's symptoms were not severe enough to warrant that diagnosis. Dr. Goldman also testified that Thompson's disorder was transient, not permanent, and could be treated effectively.

The trial court denied each side's motion for a directed verdict. The jury returned its verdict for Thompson. The District and Maury filed this timely appeal.

II.

The District contends that Thompson's common law claims against the District are precluded by the exclusivity provision of the disability compensation portion of the Comprehensive Merit Personnel Act (CMPA), D.C. Code §§ 1-624.2 to -624.46 (1987). Section 1-



624.16(c) provides:

The liability of the District of Columbia government. . .under this subchapter. . .with respect to the injury or death of an employee, is exclusive and instead of all other liability of the District of Columbia government. . .to the employee. . .in a direct judicial proceeding, [or] in a civil action.

. . .

"This provision. . .has been construed as limiting the government's tort liability only for injury or death within the scope of the Act." Tredway v. District of

Columbia, 403 A.2d 732, 734 (D.C.)

(construing the Federal Employees

Compensation Act (FECA), which is

identical to the disability compensation portion of CMPA), cert. denied, 444 U.S.

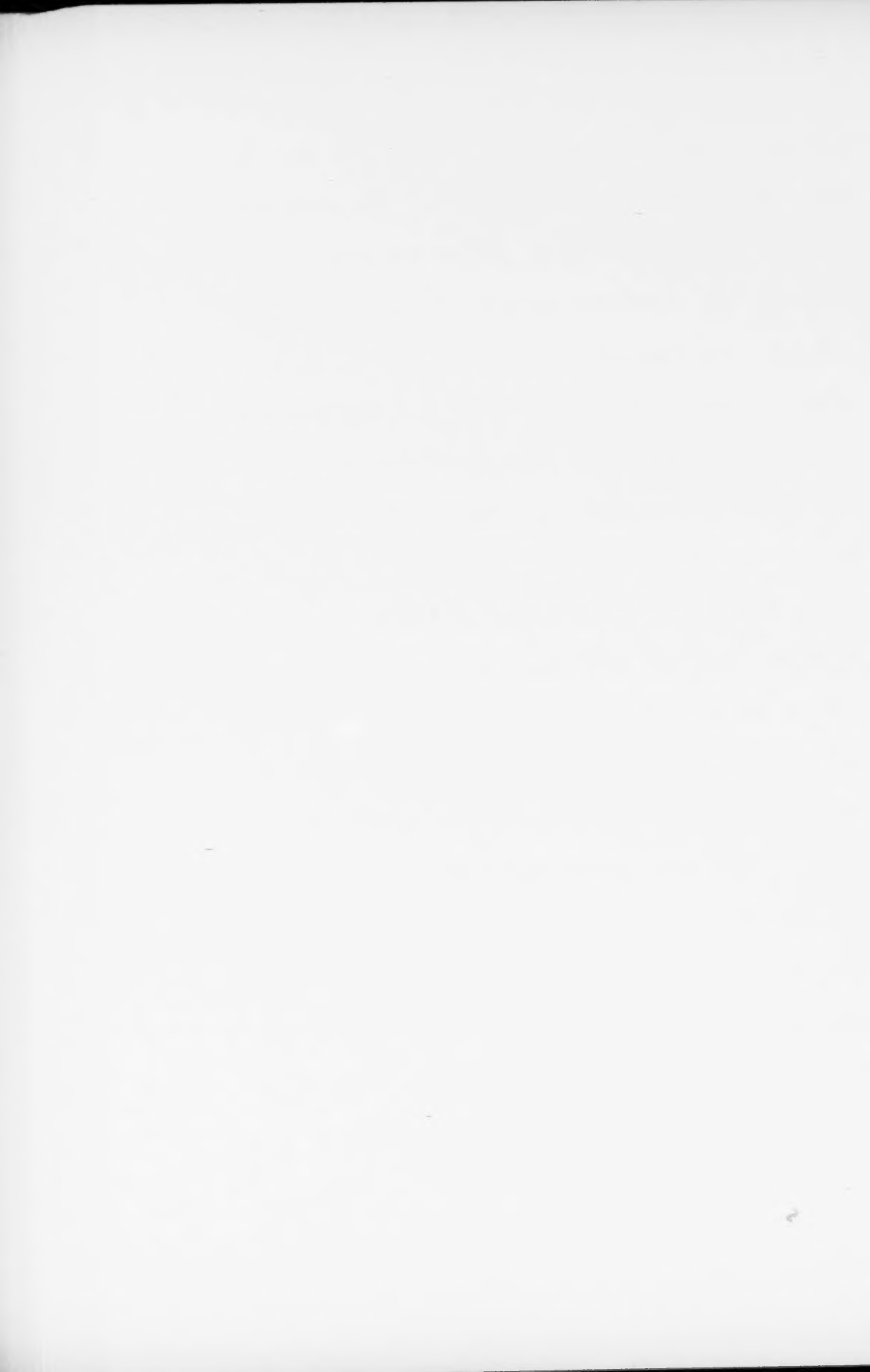
867 (1979). We conclude, accordingly,



that an employee may sue the District if, but only if, the employee's injury falls outside of the scope of CMPA. Otherwise, the employee may seek compensation only through an administrative proceeding before the agency charged with administering the disability compensation provisions of CMPA, the District of Columbia Department of Employment Services (DOES).²

In the interests of uniform application of the law, moreover, if there is a "substantial question: whether an employee's injury is covered by CMPA, the employee must submit her claim to DOES. She may then sue the District only if the claim is disallowed. See Tredway, 403 A.2d at 734-35; Reep v. United States, 557 F.2d 204, 207 (9th Cir. 1977)

²27 D.C. Reg. 2732; 28 D.C. Reg. 1008-15 (1981).



(construing prerequisites under FECA to Federal Tort Claims Act (FTCA) suit against the United States); Bailey v. United States, through the Dep't of the Army, 451 F.2d 963, 965 (5th Cir. 1971) (same). A substantial question arises unless the injury is "clearly" not compensable under CMPA. Tredway, 403 A.2d at 735.

The first issue we must address, therefore, is whether Thompson's claims suggest a "substantial question" as to whether they fall within CMPA and, therefore, require her to submit her claims to DOES before filing a common law suite against the District. We consider, initially, Thompson's claimed mental injuries. We have held that certain types of mental injuries are not covered. In Mason v. District of Columbia, 395 A.2d 399 (D.C. 1978) (construing federal



law identical to CMPA), the plaintiff filed an action for assault and battery, false arrest, and false imprisonment. She claimed that she had endured "mental suffering," as a result of "humiliation," and "embarrassment" caused by the underlying acts. Id. at 402-03. We held that this "mental suffering" alleged by Mason was not an "injury" within the meaning of the Act. Id. at 403. We also held that Mason had not alleged any "disability" caused by her injuries. Id. at 403-04. Because Mason's claims did not fall within the federal act, we reversed a dismissal of her claims. Id. at 404. Similarly, in Newman v. District of Columbia, 518 A.2d 698, 705-06 (D.C. 1986), a case decided under CMPA, we held that allegations of "humiliation," "embarrassment," "public ridicule," and "personal indignity" did not amount to an



"injury" within CMPA and that, because the appellant in Newman did not claim he was disabled by his injuries, CMPA was inapplicable.

Not all claims for mental injuries fall outside of CMPA, however. This court in Mason distinguished claims for "general mental distress," such as those in Mason, from claims for "particular and medically definable mental and emotional illnesses and conditions" not present in Mason. 395 A.2d at 403 n.5. We acknowledged that claims for "various kinds of mental injury causally related to. . .employment" do fall within the scope of the Act, citing instances where claimants had received compensation. Id. at 403.

Like the plaintiffs in Newman and Mason, Thompson alleged in her complaint that she had suffered "embarrassment,

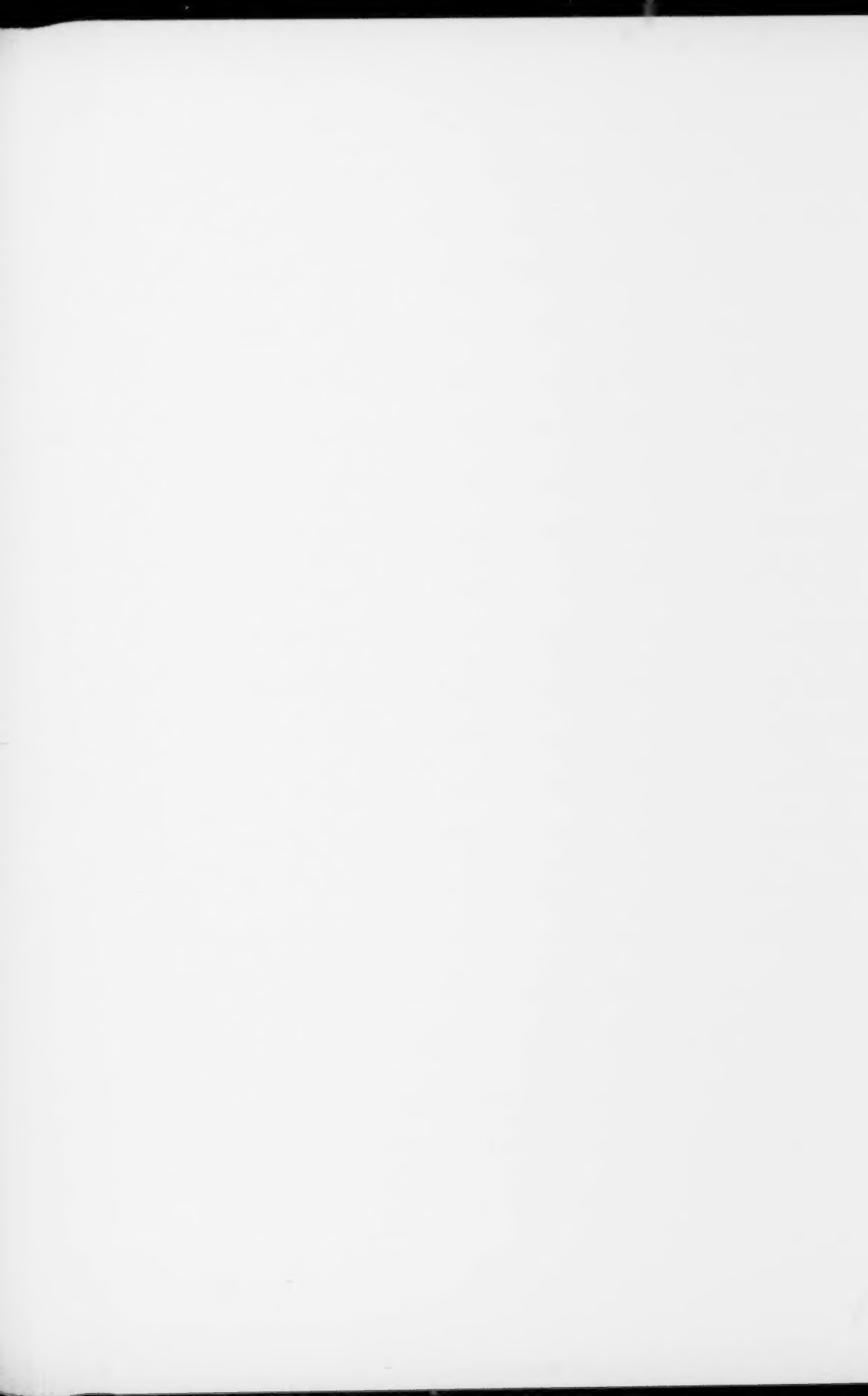
gross physical abuse, pain, mental anguish, anxiety, turmoil and suffering, humiliation, intimidation and enforced solicitude." She did not allege that she was disabled because of these injuries. In her pretrial statement, however, Thompson proposed calling Dr. Board to describe the "major affective disorder" which Thompson claimed she had suffered as a result of her injuries on the job. This supplemental pretrial statement, therefore, changed Thompson's claims. It made them different from those in Newman and Mason, for Thompson now claimed that she not only had endured mental suffering but also had incurred permanent and serious psychological injuries. While her claim of mere embarrassment and mental anguish are not "injuries" within the meaning of CMPA, see Newman, 518 A.2d at 705; Mason, 395 A.2d at 403, there is

at least a substantial question whether the type of psychological injury Thompson alleged, a major affective disorder, falls within CMPA. See Mason, 395 A.2d at 403 n.5.

In the parties' Joint Pretrial Statement, moreover, Thompson again alleged that, because of the "mental devastation" she had suffered, she was unable to obtain full-time employment. Thompson proposed calling Joseph Tryon, an economist, to testify about her future lost wages attributable to her injuries. The addition of Tryon's proposed testimony, therefore, also helped enlarge Thompson's claims in a way that raised at least a "substantial question" of whether she had suffered a mental disability.

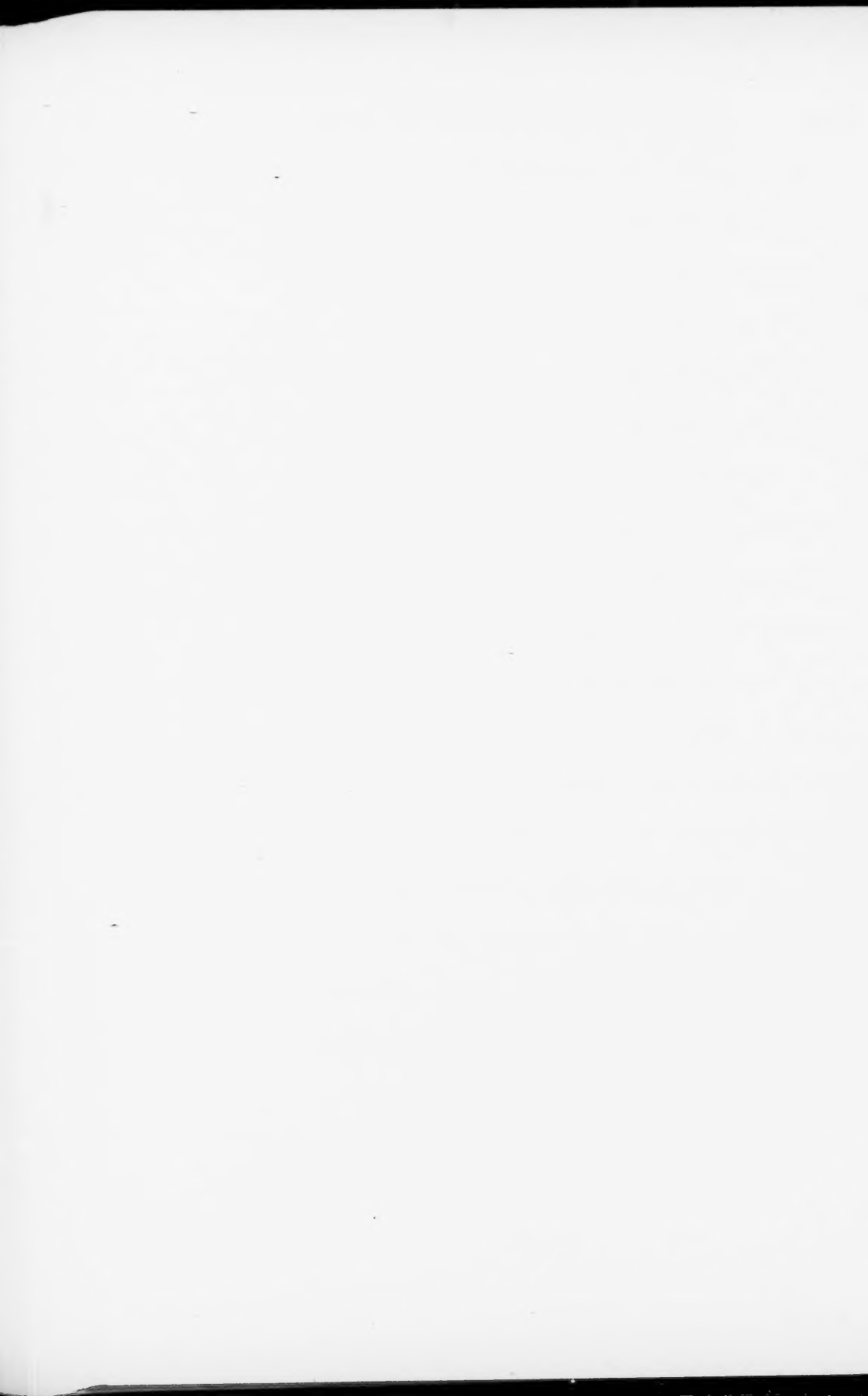
It is true that CMPA does not contain a definition of the term "disability." The District of Columbia

Workers' Compensation Act (WCA) that applies to private employers, however, defines "disability" as "physical or mental incapacity because of injury which results in the loss of wages." D.C. Code § 36-301 (8) (1988). See also 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 57.11 (1987) ("disability" means disability in the medical or physical sense that leads to an inability to earn wages). Moreover, this court in Smith v. District of Columbia Dep't of Employment Servs., 548 A.2d 95, 100 (D.C. 1988), explained that compensation under WCA is predicated upon injuries that cause the "loss of wage earning capacity, or economic impairment. . . ." While the WCA and accompanying caselaw are not directly applicable, and while Thompson did not specifically allege that she was "disabled" because of her injuries, the



conceptual closeness of WCA to CMPA, coupled with the expansion of Thompson's claim, as evidenced by the proffered testimony of her experts, effectively turned the claim of mental injuries into one of mental disability at least arguably within the scope of CMPA.

Thompson replies that CMPA, nonetheless, does not preempt her claim of mental injury, let alone her claim of physical injury, because CMPA does not cover injuries caused by intentional torts. She says that CMPA's definition of "injury" as "injury by accident," D.C. Code § 1-624.1 (5) (1987), excludes intentional injuries. While this court has not expressly determined whether intentional torts inflicted by co-workers or supervisors fall outside of CMPA coverage, we said in Tredway--a case involving an attack on an employee by



strangers--that "[p]hysical attacks by third parties sustained in the performance of the employee's duties are clearly covered by FECA."³ 403 A.2d at 735. We relied on two cases decided under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) holding that assaults by co-workers were compensable injuries, Penker Constr. Co. v. Cardillo, 73 U.S. app. D.C. 168, 188 F.2d 14 (1941); Hartford Accident & Indemnity Co. v. Cardillo, 72 U.S. App. D.C. 52, 112 F.2d 11, cert. denied, 310

³As to the argument that Tredway's type of injury was not causally related to Tredway's type of employment, we stated that all that is required to connect the injury to the employment is that the "injury result from a risk incidental to the environment in which the employment places the claimant." Tredway, 403 A.2d at 736. Similarly, Thompson's claims that she suffered a major affective disorder attributable to harassment and an assault on the job raises at least a substantial question whether they are attributable to a risk inherent in the job environment.

U.S. 649 (1940). Similarly, in the context of the WCA, we have held that injuries caused intentionally by strangers or by co-workers are compensable and thus require employees to submit claims for workers' compensation benefits before filing suit. Grillo v. National Bank of Washington, 540 A.2d 743 (D.C. 1988) (teller killed by bank robber);⁴ Harrington v. Moss, 407 A.2d 658 (D.C. 1979) (assault by supervisor). Applying the reasoning of Tredway under

⁴In Grillo, we distinguished "injuries specifically intended by the employer to be inflicted on the particular employee," which are not accidental within the meaning of the SCA and thus may service as the basis for a lawsuit. 540 A.2d at 744, 748. This limitation, however, extends only to those persons who are "realistically the alter ego of the corporation" and not merely a supervisory employee. Rustin v. District of Columbia, 491 A.2 496, 501 (D.C.) (quoting 2A LARSON § 68.22) (interpreting LHWCA identical to WCA), cert. denied, 474 U.S. 946 (1985). Thompson has not alleged that the library intended Maury to assault or defame her.

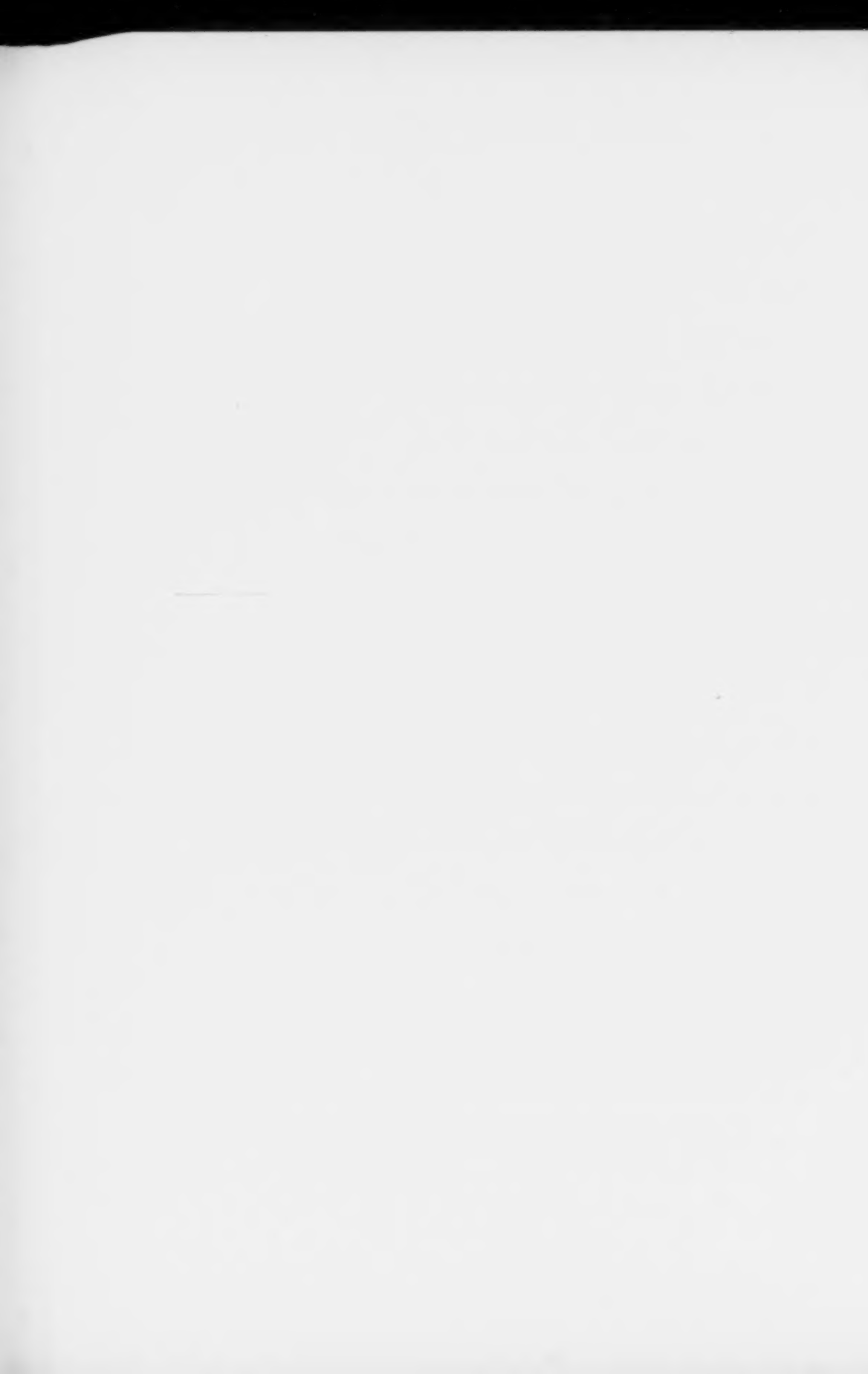


the identical federal provision, as well as the analysis in cases interpreting the WCA, we conclude that Thompson's claims of intentional torts committed by a co-worker raise at least a substantial question whether they are covered by CMPA.

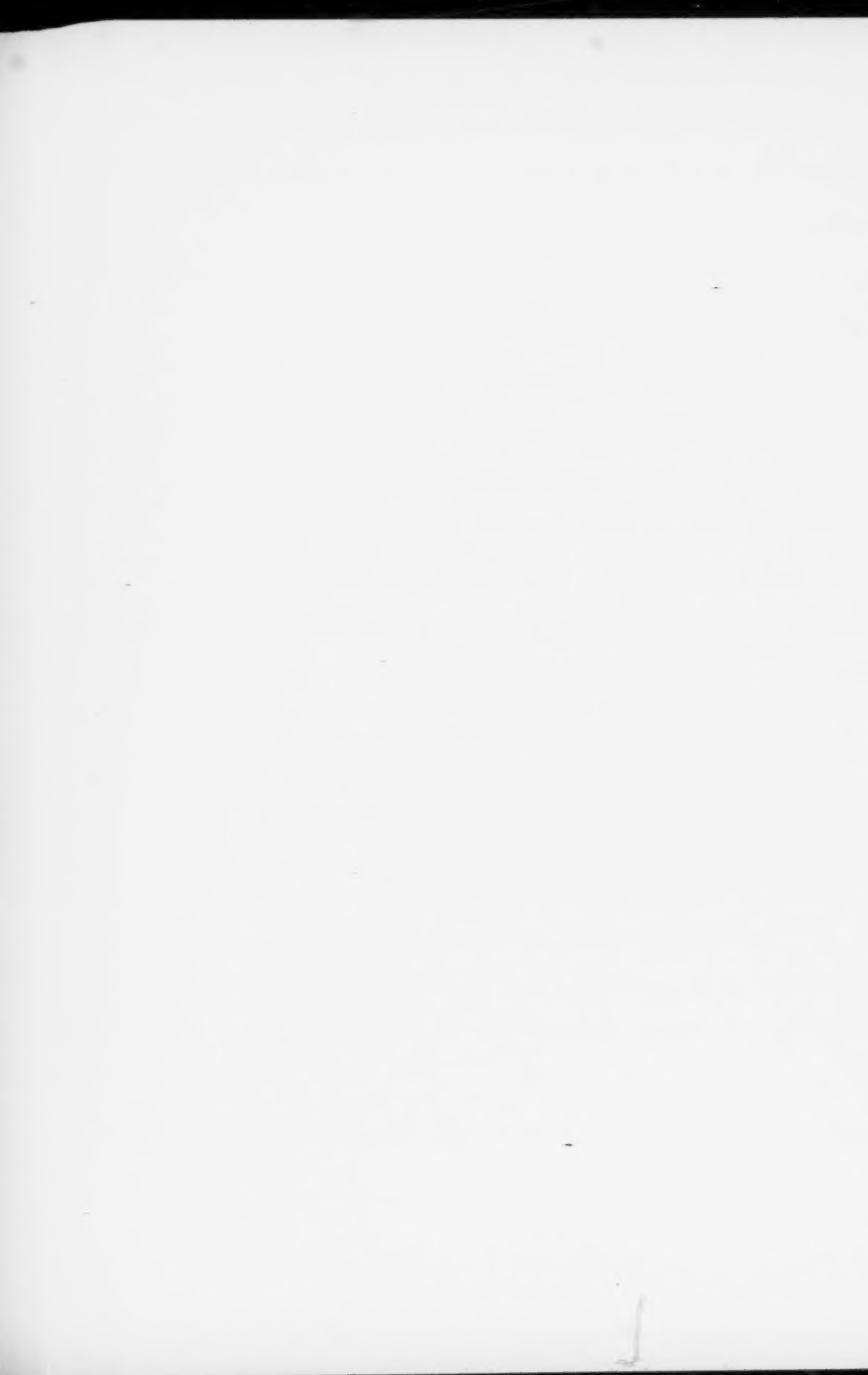
In sum, while, under Mason and Newman, Thompson would not have been required to file a claim with DOES based on the allegations about mental injuries in her original complaint, her pretrial statements expanded those claims markedly and thus created a "substantial question" whether they fall within CMPA. Moreover, Thompson's assault and battery claim against Maury, and thus derivatively against the District, also presents a substantial question under CMPA since this physical injury allegedly contributed to Thompson's disability and

intentional torts by co-workers are not necessarily excluded from CMPA coverage.

One issue remains, however. The District did not object, before or during trial, on the ground of CMPA coverage. We therefore must consider waiver. We have never decided whether the requirement that claimants submit claims to an agency before filing suit--the defense of "primary jurisdiction"--can be waived if not raised before or during trial. A question of "primary jurisdiction" arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required. See Grillo, 540 A.2d 1115, Drayton v. Poretsky Management, Inc. 462 A.2d 1115, 1118 (D.C. 1983); Harrington, 407 A. 2d at 661.



"Primary jurisdiction," like the doctrine of "exhaustion of administrative remedies," is concerned with "promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956). We generally defer to agencies for initial resolution of issues the legislature has put in their special competence. Harrington, 407 A.2d at 661. There are two reasons for this doctrine: uniformity of result and application of the specialized and expert knowledge of the agency. Drayton, 462, A.2d at 1118 (citing Far East Conference v. United States, 342 U.S. 570 (1952)). These concerns are especially applicable in the context of CMPA, where the statute gives authority to DOES to determine all questions of the District's liability



under the statute. D.C. Code § 1-624.40.

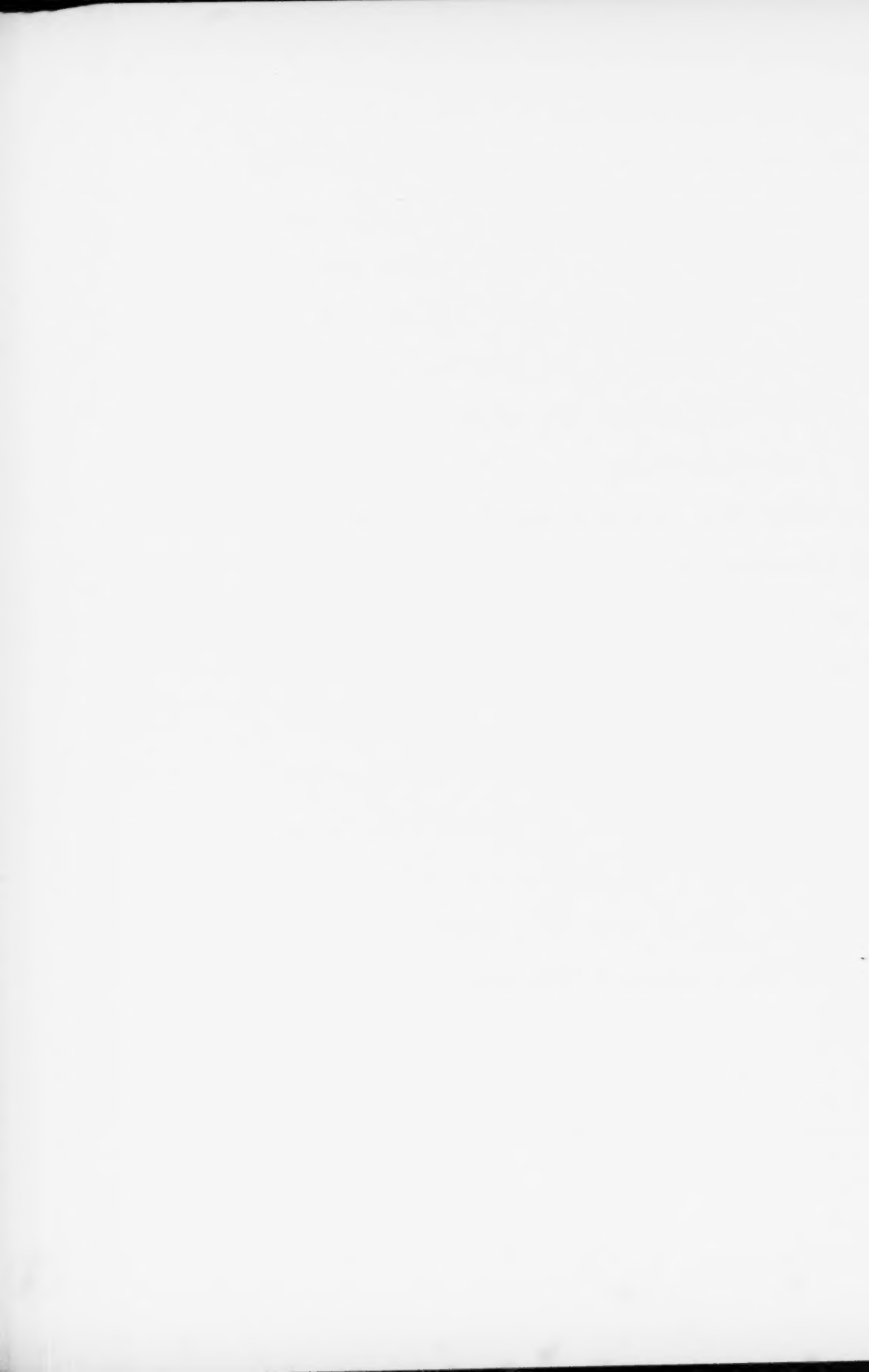
Some courts have held that the primary jurisdiction defense cannot be waived. See Distrigas of Massachusetts Corp. v. Boston Gas Co., 693 F.2d 1113, 1117 (1st Cir. 1983); Nader v. Allegheny Airlines, Inc., 167 U.S. App. D.C. 350, 365 n.37, 512 F.2d 527, 542 n. 37 (1975), rev'd on other grounds, 426 U.S. 290 (1976); Louisiana & Arkansas Ry. v. Export Drum Co., 359 F.2d 311, 314 (5th Cir. 1966); see also Western Pac. R.R., 352 U.S. at 63 (issue of primary jurisdiction considered sua sponte); Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F.2d 334 (1st Cir.), cert. denied, 400 U.S. 964 (1970) (same). These courts looked at the reasons behind the doctrine and concluded that the parties cannot waive it "since the doctrine exists for the proper



distribution of power between judicial and administrative bodies and not for the convenience of the parties." Distrigas, 693 F.2d at 1117. We agree with the rule established by these other court. We hold that the District has not waived the defense of primary jurisdiction.

Because Thompson's claims against the District raise a substantial question of coverage by CMPA, we must remand to the trial court with directions to stay this proceeding as against the District of Columbia until Thompson has had a reasonable time to file for disability benefits under CMPA. If DOES concludes that Thompson's injuries are within the scope of CMPA,⁵ then the trial court must vacate the judgment against the District

⁵If Thompson's claims are within the scope of CMPA, there is still the question whether they are timely under D.C. Code § 1-624.22--a question for DOES in the first instance.



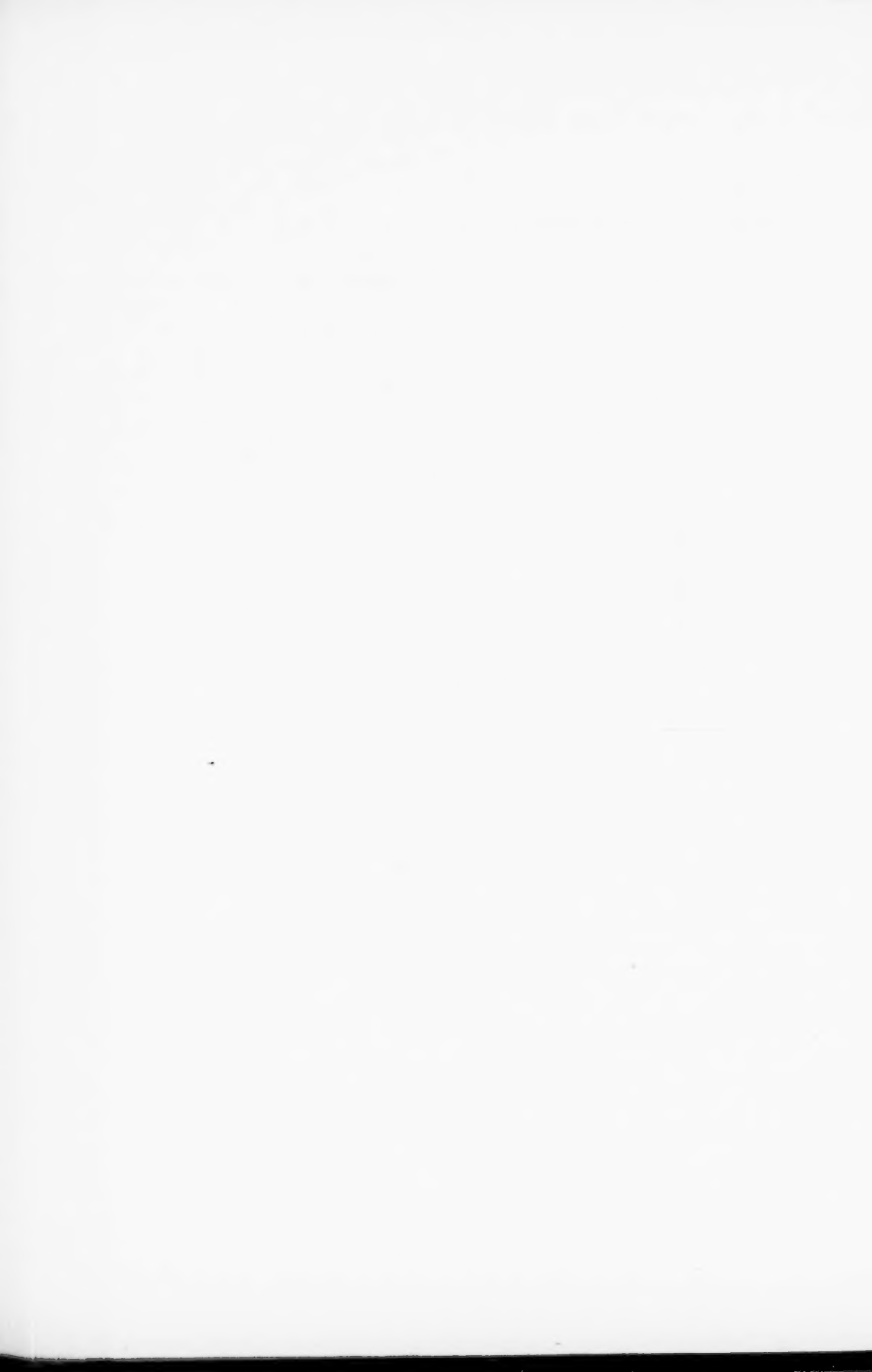
and dismiss the action.⁶ If, however, DOES concludes that Thompson's injuries are not within the scope of CMPA, then,

⁶We do not consider the question whether Thompson can lawfully sue the District if DOES concludes Thompson's injuries fall within the scope of CMPA but disallows benefits for some other reason. There is dicta in Newman to the effect that the exclusivity provision of the disability portion of CMPA applies only if the employee receives benefits under the statute. Newman, 518 A.2d at 704-05. This discussion in Newman, however, is at odds with earlier cases interpreting FECA. See Tredway, 403 A.2d at 734-35 ("[T]he general rule is that the compensation act remedy is exclusive, even though under the facts of the particular case no compensation is payable or even though the compensation act fails to provide for the full extent of the employee's damages.") In addition, CMPA provides exceptions from coverage in certain circumstances, D.C. Code § 1-624.2, such as the willful misconduct of the employee. id. at § 1-624.2(1). It is unclear whether the dicta in Newman was intended to modify existing interpretations of FECA and to create a situation in which an employee, although within the coverage of CMPA but disqualified from benefits, could still sue the District in tort. We do not decide this issue, but we note that if this situation arises after the remand, it could be raised for resolution in the trial court.

because of our reversal on other grounds, the trial court may order a new trial as to the District.

Because the remand and stay as to the District do not affect Thompson's claims against Maury in his individual capacity,⁷ we proceed to the other issues, recognizing that their resolution as to Maury also may affect the District's derivative liability in the event DOES rules that CMPA is inapplicable. We therefore proceed as

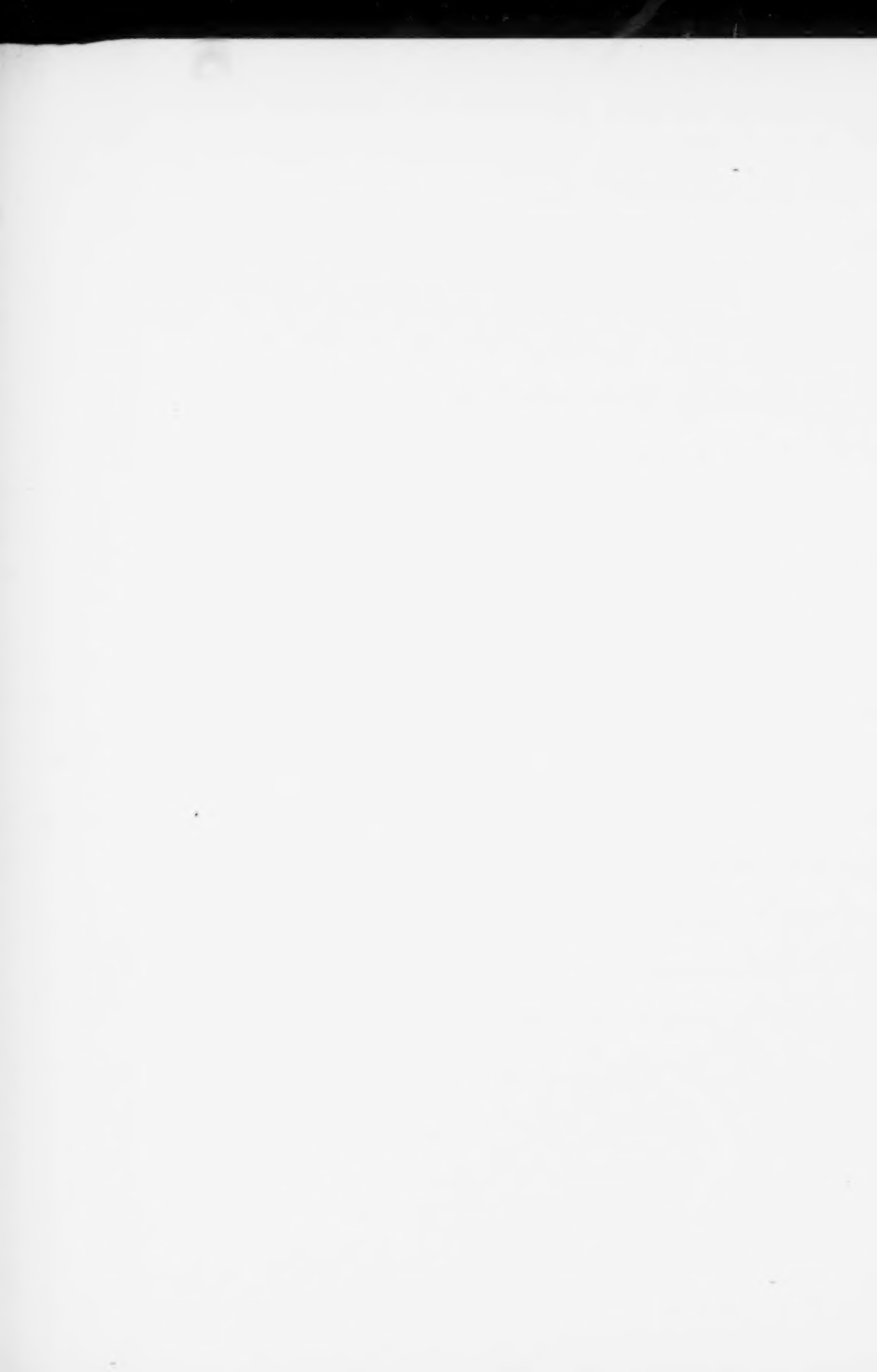
⁷No one has suggested that Maury should be exempted from liability if the District is immune under D.C. Code § 1-624.16(c). Accordingly, we do not address this theoretical possibility. While cases interpreting FECA have held that the exclusivity provision does not affect the liability of co-employees, see Heathcoat v. Potts, 790 F.2d 1540 (11th Cir. 1986), cert. denied, 484 U.S. 1025, 108 S. Ct. 747 (1988); Bates v. Harp, 573 F.2d 930 (6th Cir. 1978); Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962), we do not intend implicitly to foreclose the possibility of a different interpretation of CMPA if the question is properly raised.



though both appellants--the District and Maury--are advancing the remaining arguments even though the focus now is only on Maury's alleged liability.

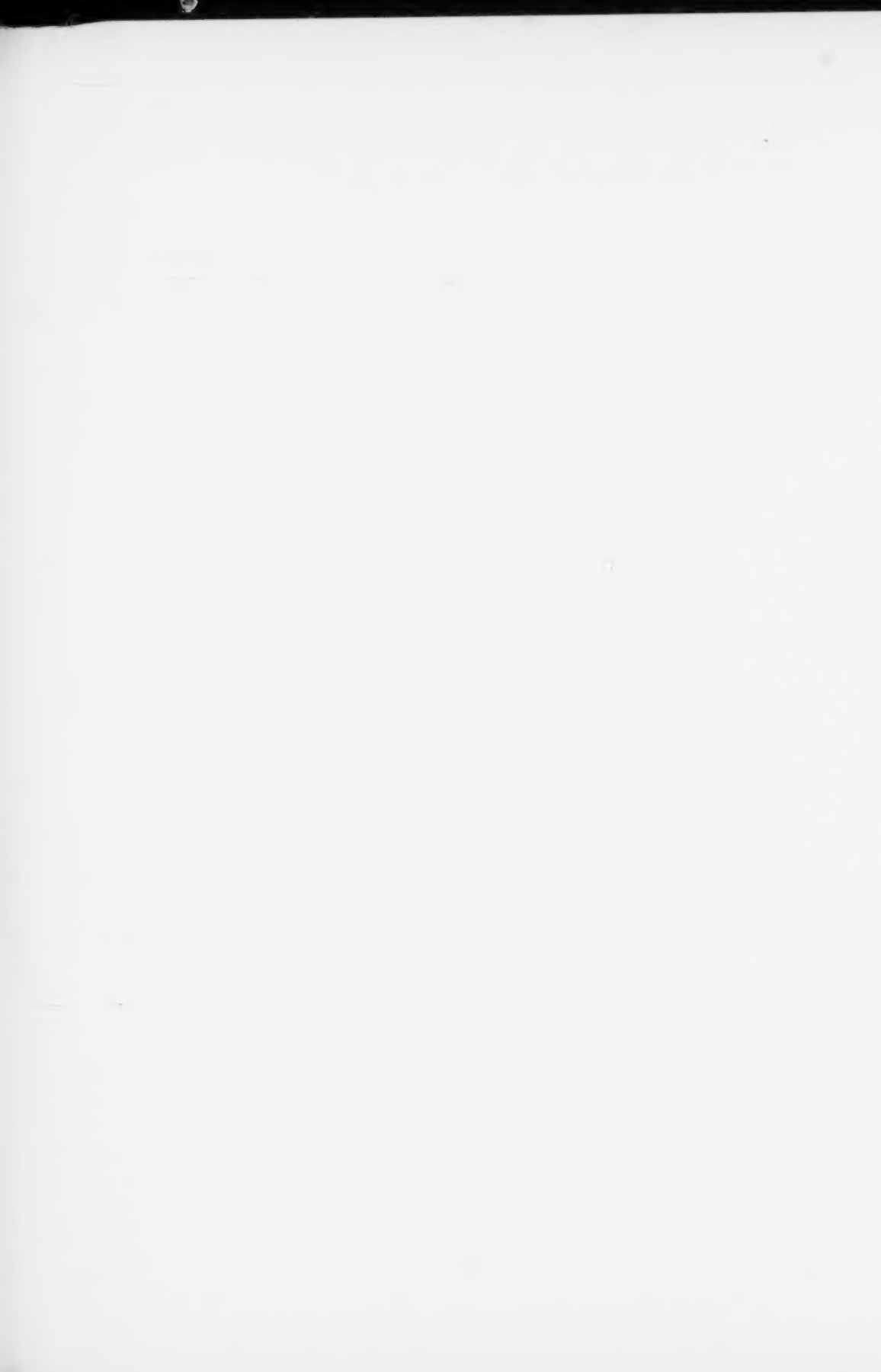
III.

Appellants next argue that Thompson's claims, in effect, challenge her dismissal for cause and, therefore, that CMPA should be construed either to preclude a court claim altogether or at least to require exhaustion of her administrative remedies before she can file suit. Appellants argue, more specifically, that the CMPA and the union contract establish a comprehensive regulatory scheme for dealing with grievances and that allowing Thompson to file suite evades and undercuts these procedures. As evidence of this comprehensive scheme, appellants note that Thompson had other options available



to challenge her discharge and alleged mistreatment by Maury, such as an appeal to the Office of Employee Appeals (OEA), D.C. Code § 1-606.3 (1987), or, if union representation was inadequate, the filing of a complaint with the Public Employees Relations Board (PERB), id. § 1-605.2(9) (1987).

We decline to hold that the provisions of CMPA which provide for employee performance evaluations, D.C. Code §§ 1-615.1 to -615.5 (1987), and govern adverse actions, id. §§ 1-617.7 to -617.3 (1987), either preclude common law claims against supervisors and the District or require exhaustion of administrative remedies. These provisions, unlike the disability provisions discussed above in Part II, do not state that they are exclusive. Compare id. § 1-624.16(c) with id. §§ 1-



615.1 to -615.5 and 1-617.1 to -617.3.

Nor is there any other requirement of exhaustion of administrative remedies before an employee can pursue her common law causes of action against the District. Appellants cite no case in the District of Columbia for this proposition⁸ but argue instead that some

⁸Thompson's claims are different from those in Hawkins v. Hall, 537 A.2d 571 (D.C. 1988), and Pender v. District of Columbia, 430 A.2d 513 (D.C. 1981), in which we required exhaustion of administrative remedies before allowing suit. In Hawkins, the plaintiffs challenged the Board of Education's deduction of union dues after the expiration of a collective bargaining agreement as an unfair labor practice. We upheld the dismissal of the plaintiff's claims, requiring exhaustion of administrative remedies before the PERB. In Pender, a police officer was suspended without pay pending criminal charges that resulted in his acquittal. When he sued for restoration of pay, we dismissed the suit concluding he had not exhausted his administrative remedies before the Commissioner of the District of Columbia or the Civil Services Commission. The doctrine of exhaustion of administrative remedies is inapplicable to Thompson's common law tort claims, however, because, unlike the claims in Hawkins and Pender,



federal courts have ruled that comprehensive administrative schemes such as CMPA preempt common law claims. The federal cases on which appellants rely, however, were decided on the basis of federal preemption of state law,⁹ a doctrine not applicable in the present case.

The question, then, is whether the provisions of CMPA that address employee

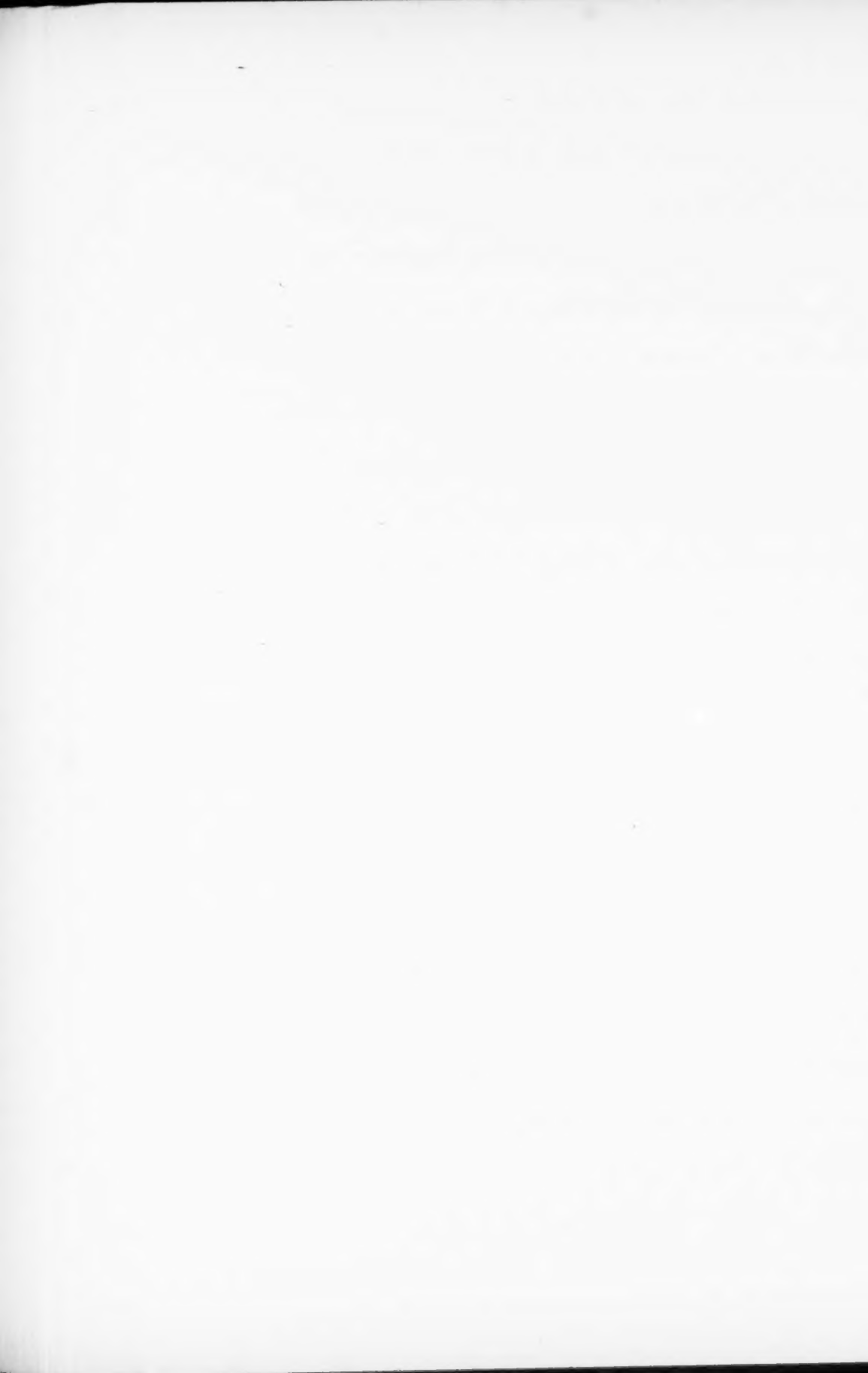
the administrative agencies, OEA and PERB, cannot provide the relief Thompson seeks. See Goode v. Antioch Univ., 544 A.2d 704, 706 (D.C. 1988).

⁹See David V. United States, 820 F.2d 1038, 1043 (9th Cir. 1987) (federal employee's claim for intentional infliction of emotional distress preempted by Civil Services Reform Act); Truex v. Garrett Freightlines, Inc., 784 F.2d 1347 (9th Cir. 1985) (claims for harassment and emotional distress preempted by federal labor law); Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir. 1984) (claim for wrongful discharge by employee, a union member whose employment was governed by collective bargaining agreement, preempted by federal labor law).

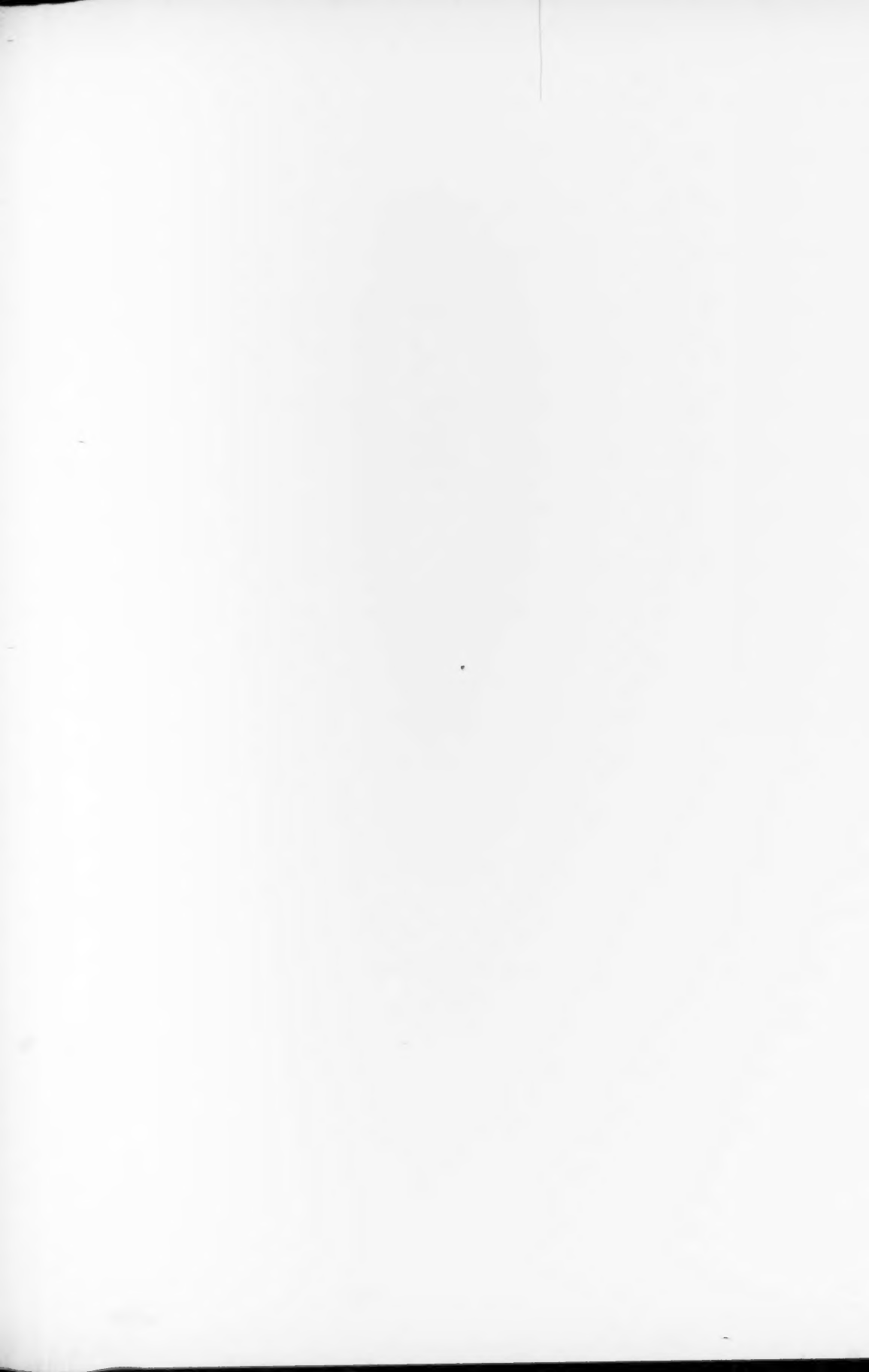
grievances have abrogated common law causes of actions for torts relating to these grievances. There is nothing in this portion of the statute suggesting it is an exclusive remedy, and we will not construe a statute as altering the common law beyond what the words of the statute require. See Dell V. Department of Employment Servs., 499 A.2d 102, 107 (D.C. 1985). We therefore conclude that the employee performance evaluation and adverse action provisions of CMPA do not bar Thompson's common law tort claims or require exhaustion of administrative remedies.

IV.

We turn to the merits. Appellants contend the trial court erred in denying them a directed verdict on the count of intentional infliction of emotional distress because the acts complained of



were not sufficiently "outrageous" as a matter of law. To succeed on a claim of intentional infliction of emotional distress, a plaintiff must show "(1) 'extreme and outrageous' conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff 'severe emotional distress.'" Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C.) (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)), cert. denied, 459 U.S. 912 (1982); see also Waldon v. Covington, 415 A.2d 1070, 1076 (D.C. 1980). The law, therefore, does not impose liability for all conduct causing mental distress. Clark v. Associated Retail Credit Men of Washington, D.C., 70 U.S. app. D.C. 183, 185, 105 F.2d 62, 64 (1939) (no "general duty of care to avoid causing mental distress"); see also



RESTATEMENT (SECOND) OF TORTS § 46
comment d (no liability for "mere
insults, indignities, threats,
annoyances, petty oppressions, or other
trivialities"). A defendant is only
liable for acts "'so outrageous in
character, and so extreme in degree, as
to go beyond all possible bounds of
decency.'" Jackson v. District of
Columbia, 412 A.2d 948, 957 (D.C. 1980)
(quoting RESTATEMENT (SECOND) OF TORTS §
46 comment d).

The requirement of intentional or
reckless conduct that is outrageous
strikes the balance between preventing
the harms of mental distress and allowing
beneficial activities that nonetheless
may result in some harms. See Clark, 70
U.S. App. D.C. at 185-86, 105 F.2d at 64-
65. Thus, the court, in determining
whether the conduct is outrageous, shall



consider, first, the nature of the activity. See Lee v. Metropolitan Airport Comm'n, 428 N.W. 2d 815, 823 (Minn. Ct. App. 1985) (dismissal by placing totally unexpected termination notice on employee's desk and then meeting privately with him a few minutes after he arrived for work, terminating him and sending him on his way not outrageous conduct); Hill v. Kinston, 92 N.C. App. 375, 374 S.E.2d 425 (1988) (termination carried out in responsible manner not outrageous). The court, if necessary, may also consider whether the activity is privileged. See Waldon, 415 A.2d at 1077.

Assessing Thompson's claims under this standard, we agree with Maury and the District. We conclude as a matter of law that the conduct Thompson complains of was not sufficiently outrageous to

warrant recovery. Thompson's claim of intentional infliction of emotional distress rests on the following actions: Maury criticized her in memorandum after memorandum; he approved her leave and then changed her status to absence without leave; he refused to consider her for promotion to the next grade level or to give her the computer test she asked for; he isolated her from the other employees; he requested statements from her doctor as to her limited hours; he wrote memoranda on her excessive leave; and he assaulted her and lied about it, resulting in her job loss.

With the exception of the alleged assault, this conduct by a supervisor is of a type inherent in the employment situation and, on this record, was not unusually egregious. Maury wrote memoranda to Thompson advising her of

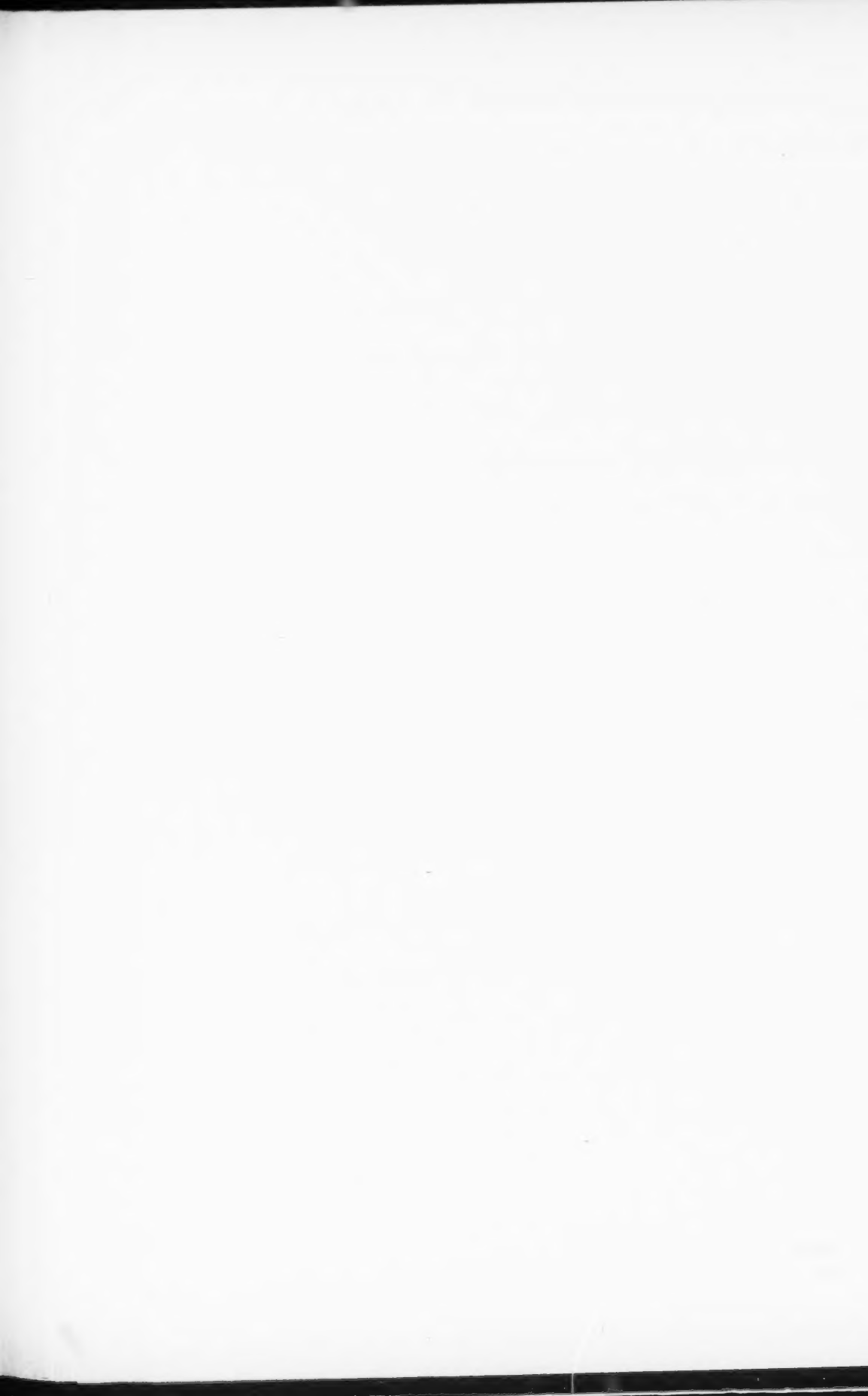
problems in her performance in accordance with the union contract, and the contents of the memoranda, even if false as Thompson alleges, are not outrageous. Nor was the alleged assault--pushing Thompson against the wall and pointing of finger, coupled with threatening words--sufficiently egregious under the applicable standard. See International Sec. Co. of Virginia V. McQueen, 497 A.2d 1076 (D.C. 1985); Sztan v. Seilers Corp., 344 F. Supp 344, 345-46 (D.D.C. 1985) (citing Shewmaker v. Minchew, 504 F. supp. 156, 163 (D.D.C. 1980), aff'd, 215 U.S. App. D.C. 3, 666 F.2d 616 (1981) (per curiam)).

Thompson's claims are similar to those in Howard Univ. v. Best, 484 A.2d 958, 986 (D.C. 1984), where we rejected Best's argument that her allegations of interference with her professional

responsibilities as department chair constituted intentional infliction of emotional distress. We held that "[s]uch employer-employee conflicts do not, as matter of law, rise to the level of outrageous conduct." Id.; see also Hogan v. Forsyth Country Club, Co., 79 N.C. App. 483, 493-94_, 340 S.E.2d 116, 122-23 (1986) (supervisor's screaming and shouting at employee, calling her names, interfering with her supervision of subordinates, throwing menus at her, and finally firing her not extreme and outrageous conduct).

Thompson further argues, however, that, even if Maury's actions were not in themselves outrageous, Maury acted with knowledge that he was causing severe emotional distress. We agree that acts which are not generally considered outrageous may become so when the actor

knows that the other person is peculiarly susceptible to emotional distress. See Anderson v. Prease, 445 A.2d 612, 613 (D.C. 1982) (sufficient evidence of outrageous conduct where defendant-physician who prescribed valium for plaintiff, his patient, and therefore knew of plaintiff's fragile condition, cursed her and screamed that she should leave his office); Tandy Corp. v. Bone, 283 Ark. 399, 406-09, 678 S.W.2d 312, 316-17 (1984) (evidence sufficient for jury finding of extremely outrageous conduct where employee not permitted to take his medication during day-long interrogation and required polygraph test). The rule established by these cases applies when the defendant is aware of some special sensitivity on the part of the plaintiff and acts either ignoring or exploiting this sensitivity.



To make this argument, Thompson relies on Maury's affirmative answers at trial to two questions: whether Thompson "was very upset with all the documents [Maury] had been serving on her" and whether Thompson was "starting to show signs of being emotionally upset." Contrary to Thompson's assertions, however, this evidence does not show that Maury acted with knowledge that Thompson was unusually sensitive and likely to suffer "extreme emotional distress." This evidence only shows that Maury knew Thompson was unhappy with, or perhaps despondent about, the criticism she was receiving from her supervisor.

Because the conduct underlying Thompson's claim for intentional infliction of emotional distress was not "outrageous" as a matter of law, we remand to the trial court for dismissal



of that claim.

V.

The next claim is defamation.

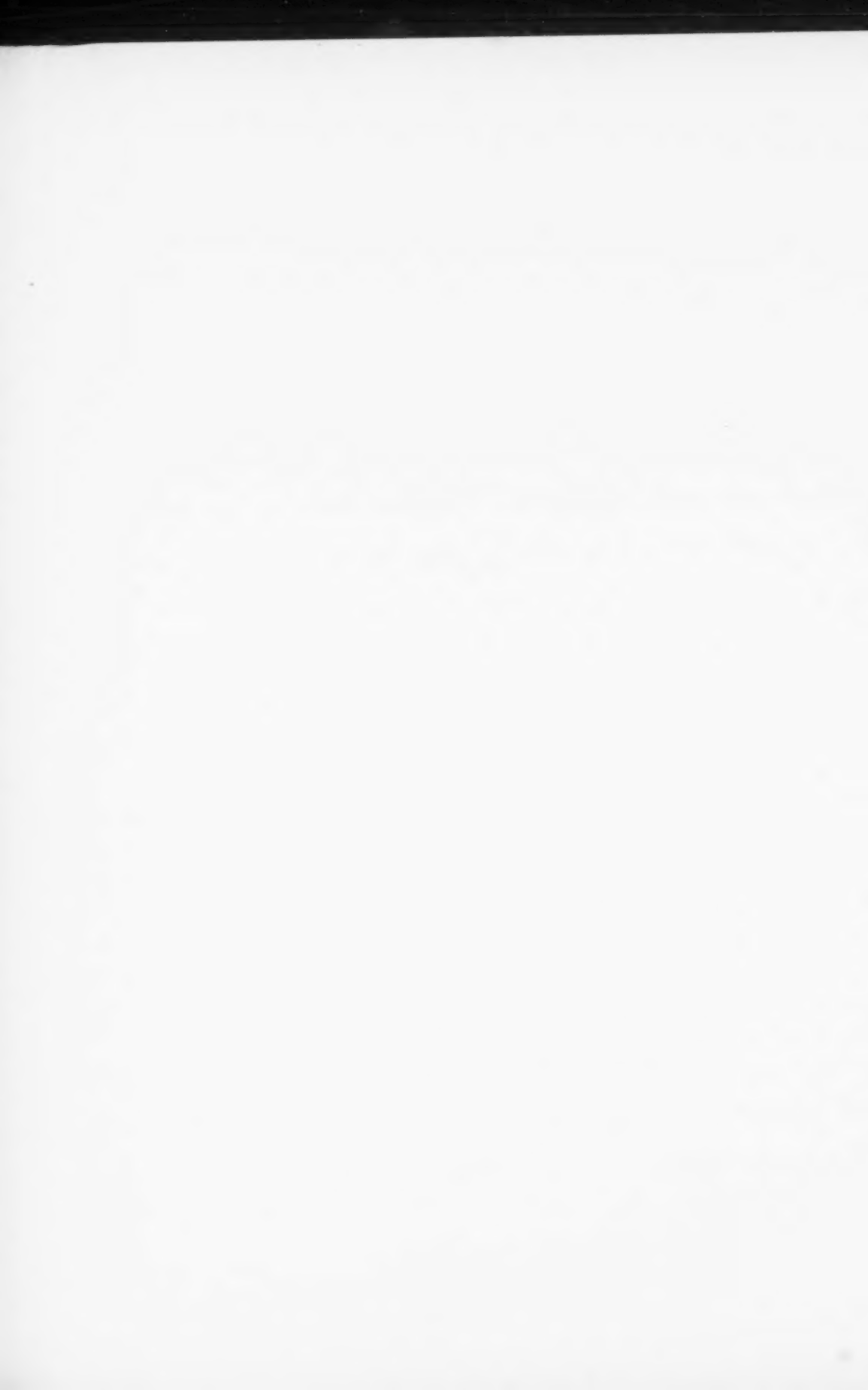
Appellants contend the trial court erred by refusing to grant a directed verdict in their favor on this count because there is no evidence the allegedly defamatory documents were published and, in any event, because these documents were absolutely privileged.

A.

Appellants maintain there is no evidence that Maury's statements were "published" because they were not disseminated outside of the Library. We disagree. To establish a cause of action for defamation, a plaintiff must show that defamatory statements were "published," i.e., that they were "communicated to some person other than the one defamed." Tocker v. Great Alt. &

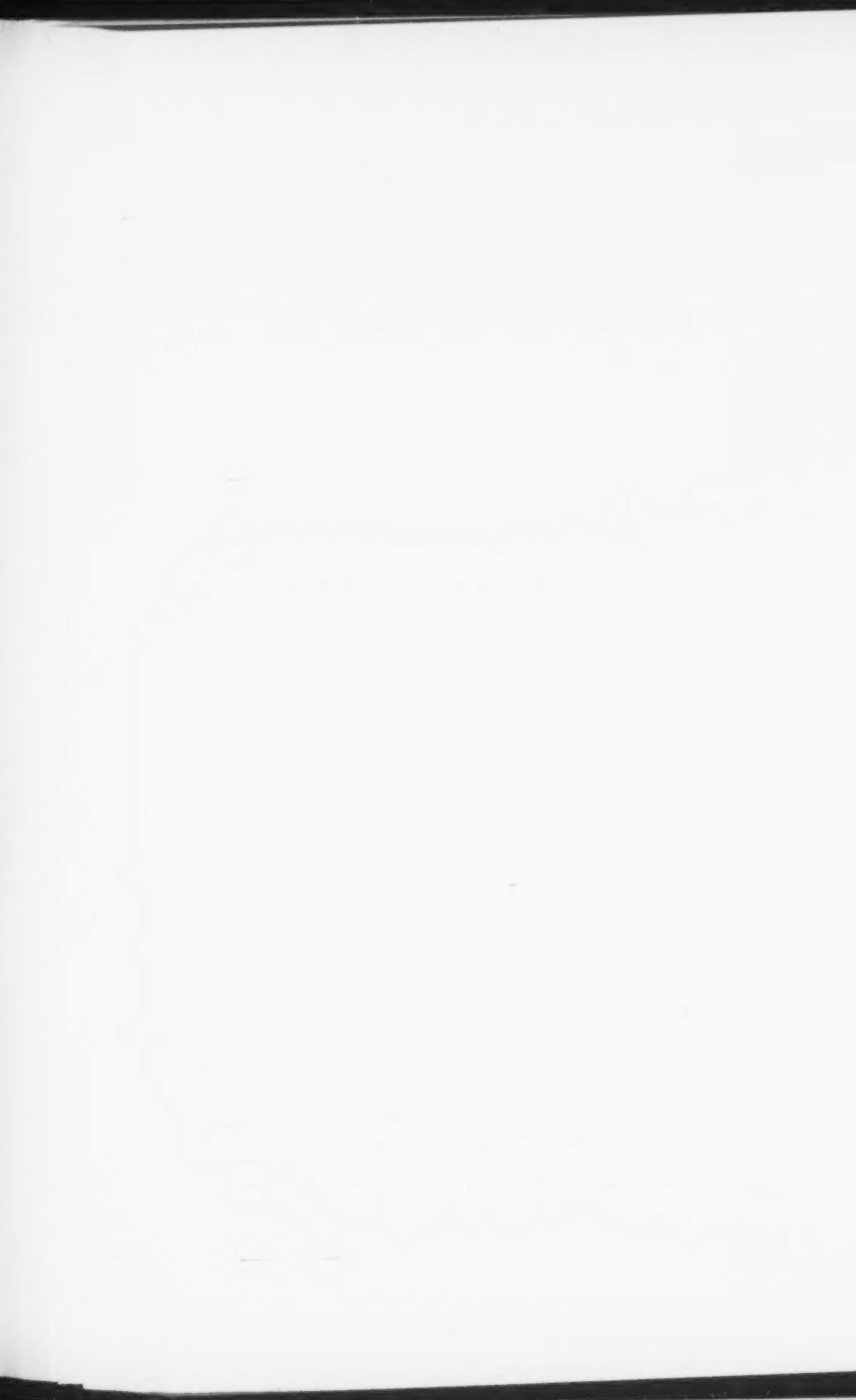
Pac. Tea Co.., 190 A.2d 822, 823 (D.C. 1963); see RESTATEMENT (SECOND) OF TORTS § 577 (1) (1977) ("Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed."); W.P. KEETON, PROSSER & KEETON ON TORTS § 113, at 798 (5th ed. 1984) ("There may be publication to any third person."). Based on this standard, Thompson has shown that the statements she claims defamed her, especially Maury's statements that Thompson assaulted him, were communicated to third parties.

More specifically, Maury called Washington after the incident and reported the incident to her. He met with Sweeney, Washington, and Thompson to discuss the incident, and he sent a memorandum describing the incident to Washington. Many of the other memoranda



Thompson claims are defamatory were sent directly to the personnel department. Appellants have not specifically identified any relevant writing that was not sent to third parties and therefore was not "published."

Appellants cite Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984), for the proposition that statements not disseminated outside the library are not "published." Best, however, is inapposite. There, the College of Pharmacy Management Committee circulated to the faculty a report prepared by outside consultants that was critical of Dr. Best, the chair of the Department of Pharmacy Practice. Dr. Best contended that the report "was defamatory and was circulated outside the University." Id. 988. She noted, for example, that "at several professional meetings around the



country she was told "I understand you can't get along with the dean, that they had to can you.'" Id. On cross-examination, however, she testified "that she did not know who had circulated the report beyond the faculty and could not identify anyone, outside of the faculty, who had seen the report." Id. This court said:

The trial court directed a verdict against her on the grounds that the evidence established a qualified privilege; there was insufficient evidence of publication outside of the faculty; and the report was not defamatory on its face and Dr. Best had not proved a defamatory meaning. We affirm on the grounds that the report was not demonstrated to be defamatory and there was insufficient evidence of



publication.

Id. We added in a footnote: "Because we agree with the trial court that the report was not defamatory, we need not determine the existence of a qualified privilege." Id. (citation omitted).

Although we ruled on two grounds, including "insufficient evidence of publication," it is clear that the issue of publication--indeed, of the defamation itself--was limited to alleged dissemination of a defamatory report outside the university; there was no claim that distribution of the report to the faculty was a publication that defamed Best. See id. at 988-89. Accordingly, Best does not come to grips with the question whether dissemination of a defamatory report within a faculty--or, as in this case, within a group of employer-supervisors and their

assistants--is a "publication."

Given our decision in Tocker, as well as the definition of "publication" in the RESTATEMENT (SECOND) OF TORTS § 577 (1), it is clear that any communication to someone other than the person defamed is a publication. Thus, the basis, if any, for excusing dissemination of a defamatory report within a faculty (as in Best) or within an employment group as in this case is not the lack of a publication but the existence of a qualified privilege--a privilege which can be lost if the publication occurs outside normal channels, is otherwise excessive, or was made with malicious intent. See Thomas v. Howard, 168 A.2d 908, 910 (D.C. 1961) (employer investigating employee's business conduct); Greenya v. George Washington Univ., 167 U.S. App D.C. 379,

386, 512 F.2d 556, 563 (faculty discussing qualifications of colleagues) cert. denied, 423 U.S. 995 (1975) (cited in Best, 484 A.2d at 989). We therefore turn to the question of privilege.

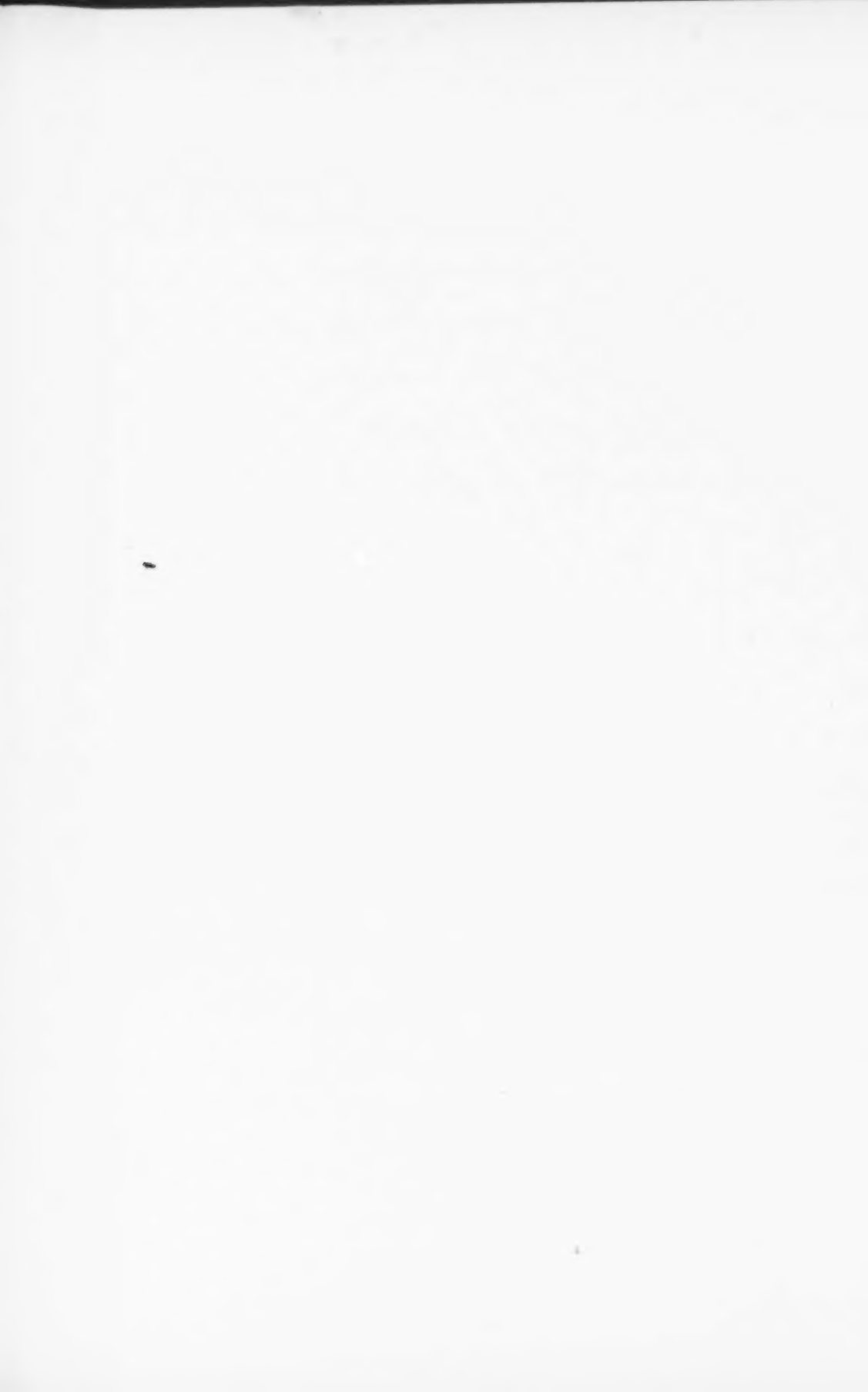
B.

Appellants argue that the trial court erred by not granting a directed verdict for Thompson's defamation claims because Maury was absolutely privileged to make the statements. Appellants present three arguments: (1) Thompson consented to the statement; (2) the documents were required by law; and (3) Maury, as a government official, was absolutely immune from suit.

Appellants did not raise their "consent" argument in the trial court and, therefore,, may not raise it on appeal. See Presidents & Directors of Georgetown College v. Diavatis, 470 A.2d

1248, 1251 (D.C. 1933); District of Columbia v. Gray, 452 A.2d 962, 964 (D.C. 1982). As to their second argument, this court has held that an employer who is required by law to file a confidential "separation report" with the local unemployment compensation board is "absolutely privileged" against a libel action based on the contents of the report. See Goggins v. Hoddes, 265 A.2d 302, 303 (D.C. 1970). Many years earlier, the Court of Appeals for the District of Columbia had accorded an absolute privilege to communications by the Commissioner of Indian Affairs, "in the line of duty," to the Secretary of the Interior recommending dismissal of an employee of the Indian Bureau pursuant to an order of the Secretary requiring a specific statement of reasons for dismissals. Farr v. Valentine, 38 App.

D.C. 413, 420 (1912). "Had the defendant communicated these statements to one to whom he was under no obligation or duty to report, as the Commissioner of Pensions, a different case would be presented." Id. 15 421. The court relied on its earlier decision in DeArnaud v. Ainsworth, 24 App. D.C. 167, 176 (1904), granting an absolute privilege to a War Department employee who allegedly had libeled an applicant for a medal of honor in a report reflecting "the exercise of his official duty" pursuant to department regulations. Clearly, therefore, the courts of this jurisdiction have recognized an absolute privilege for statements by subordinate public officials reporting to their superiors as required by particular regulations--a so-called privilege for mandatory duties.



Such a privilege might have been available to Maury. Appellants, however, failed to present this argument in the trial court, and, in any event, we cannot be sure from the record that the statements at issue here come within the absolute privilege. Accordingly, we cannot properly address appellants' second argument. See Diavatis; Gray. Appellants, therefore, are limited on appeal to their third argument, which they did advance at trial: the defense of official immunity (necessarily limited to acts other than those protected by the special rule for mandatory duties).¹⁰

¹⁰Appellants argued at trial, in the alternative, for absolute immunity, relying primarily on Barr v. Mateo, 360 U.S. 546 (1959) (plurality opinion) and on Expeditions Unlimited Aquatic Ents., Inc. v. Smithsonian Inst., 184 U.S. App D.C. 397, 566 F.2d 289 (1977) (en banc), and for qualified immunity, relying mainly on Smith v. District of Columbia, 399 A.2d 213 (D.C. 1979).

Before turning to the issue of official immunity for District of Columbia officials, however, we want to make clear as background for analysis that the Supreme Court itself has recognized three categories of official duties or functions that have a bearing on the kind of privilege a government

In their motion for judgment notwithstanding the verdict, appellants included in their argument for absolute privilege a citation to Goggins v. Hoddes, 265 A.2d 302, 303 (D.C. 1970) (absolute privilege for report required by law to filed with unemployment compensation board). Appellants failed, however, to argue this particular theory of absolute privilege in connection with the motion for directed verdict or with the submission of proposed jury instructions. Nor, even in their post-verdict pleadings, did appellants identify Goggins as representing a "mandatory duty" subcategory of absolute privilege. Appellants' reference to Goggins in connection with the motion for judgment n.o.v., therefore, did not call appellees' and the trial court's attention to the "mandatory duty" theory of absolute privilege and, in any event, came too late for consideration of that theory on appeal.



official can anticipate: (1) a "mandatory duty" or "duty required by law," Barr v. Mateo, 360 U.S. 564, 575 (1959) (plurality opinion); see Westfall v. Erwin, 484 U.S. 292, 298 (1988); (2) a "discretionary" act or function, id. at 298 & n.4; Barr, 360 U.S. at 575; and (3) a middle category of official conduct that is neither "mandatory" nor "discretionary," i.e., conduct that "will often involve the exercise of a modicum of choice and yet be largely unaffected by the prospect of tort liability, making the provision of absolute immunity unnecessary and unwise." Westfall, 484 U.S. at 298. As we shall elaborate below, this category of conduct is traditionally called "ministerial." As we shall also detail further, mandatory and discretionary duties commonly give rise to absolute immunity whereas

ministerial duties at best evoke a qualified immunity.

Procedurally, moreover, we have a choice to make at this point in the analysis. We have noted that Maury was entitled to a qualified privilege as a representative of an employer investigating an employee's conduct. See Thomas, 168 A.2d at 910 (employer has qualified privilege to inquire into manner in which employees are conducting business affairs, but privilege may be lost by "showing of excessive publication of express malice"); supra Part V.A. The jury was so instructed. This means that official immunity would afford no more protection than the malice-destructible, qualified privilege available to any employer. According, we can either begin the inquiry (1) by assuming official immunity and asking whether, in the case



of a government supervisor, it is absolute or qualified,¹¹ or (2) by asking whether, on these facts, there is immunity and then, if there is, by addressing the scope of immunity.

Because the law is less clear on the scope of official immunity¹² than on the

¹¹Compare Aspen Exploration Corp. v. Sheffield, 739 P.2d 150, 157-58 (Alaska 1987) (governor entitled to qualified immunity for defamation claim) and Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc., 31 N.J. 124, 141,, 155 !.2d 536, 544-45 (1959) (immunity for administrative official's good faith exercise of discretion inapplicable where action was motivated by malice or bad faith) with Adams v. Tatsch, 68 N.M. 446, 451-55, 362 P.2d 984, 988-90 (1961) (highway commissioner absolutely immune from liability for allegedly malicious false charges against highway contractor).

¹²See Carter v. Carlson, 144 U.S. app. D.C. 388, 391 n.5, 447 F.2d 358, 361 n.5 (1971) (not clear whether District of Columbia follows federal rule of absolute immunity for malicious acts by public officials within general scope of a discretionary function)(citing Gager v. "Bob Seidel", 112 U.S. app. D.C. 135, 139-40, 300 F.2d 727, 731-32 (dictum), cert. denied, 370 U.S. 949 (1962)).

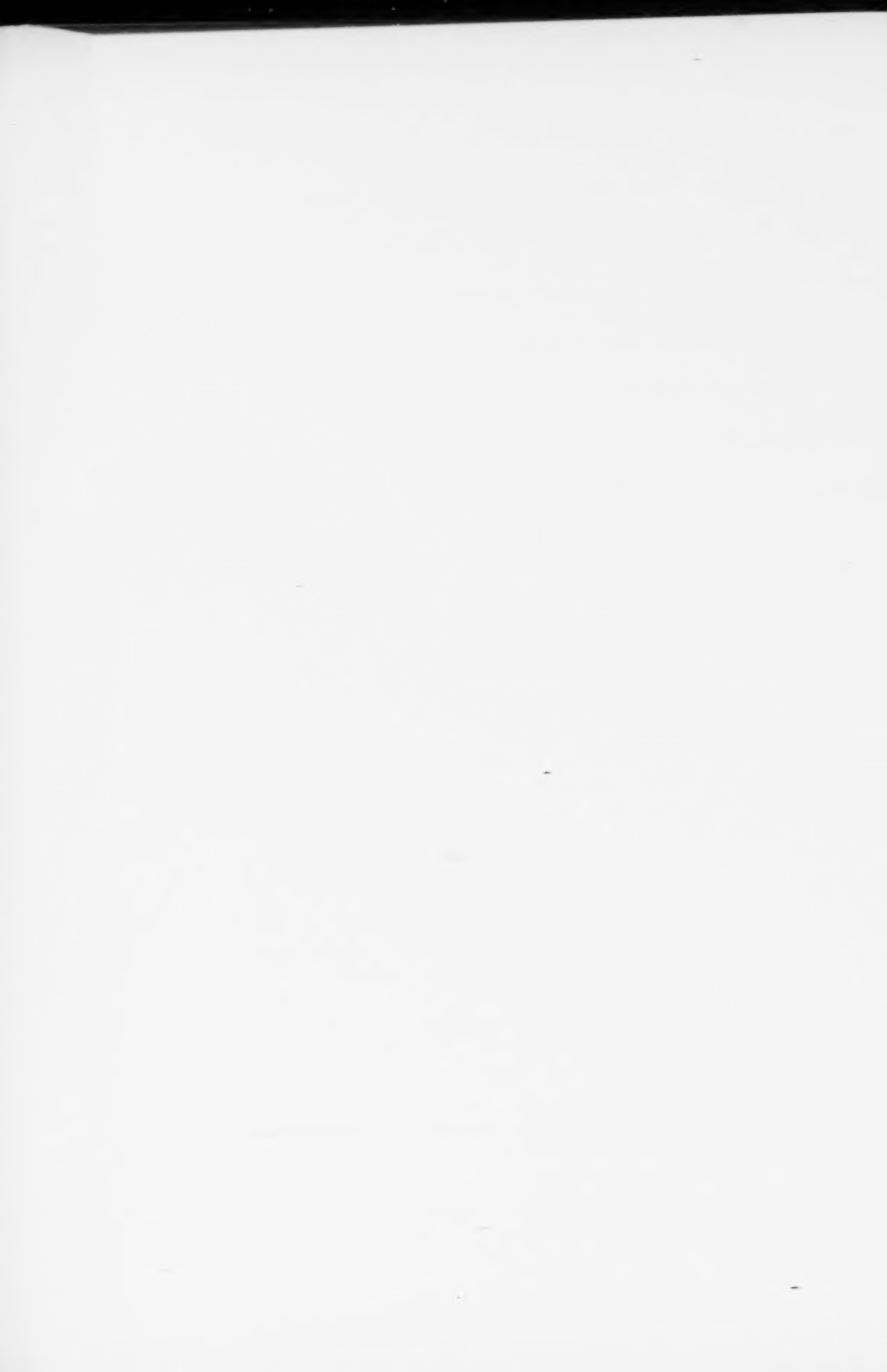
availability of immunity itself, we take the second approach.

In arguing at trial that Maury had been shielded by absolute official immunity, appellants relied heavily on Barr, supra note 10. Barr held that a federal official engaged in a discretionary act within the "outer perimeter of [the official's] line of duty" is absolutely immune from suit. Id. at 575. The Court noted that absolute immunity is available for the exercise of a mandatory duty," i.e., an action required by law. Id.¹³ The Court then reasoned that, although the defendant's action underlying the common law suit against him--an allegedly libelous press release--was not required

¹³See, e.g., Goggins, 265 A.2d at 303; Farr v. Valentine, 38 App. D.C. 413 (1912); DeArnaud v. Ainsworth, 24 App. D.C. 167 (1904).

by law or by the direction of his supervisor, the reasons for granting absolute immunity for the exercise of a mandatory duty applied with equal force to "discretionary authority." Id. Appellants argue that Maury's statements evaluating Thompson and reporting her assault comprised the types of action that Barr would protect through absolute official immunity.¹⁴

¹⁴It is unclear whether appellants, at the time of trial, understood Barr to afford absolute immunity only to "discretionary" actions or, as some courts at the time had interpreted Barr, to all conduct--including "ministerial" actions--that fall within the scope of official duties. See, e.g., General Elec. -Co. v. United States, 813 F.2d 1273, 1276-77 (4th Cir. 1987); Poolman v. Nelson, 802 F.2d 304, 307 (8th Cir. 1986). The Supreme Court recently made clear, however, in Westfall v. Erwin, 484 U.S. 292, 297-98, 298 n.4 (1988), that "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of. . . .Barr did not purport to depart from the widely followed common-law rule that only discretionary functions are immune from liability." (Emphasis in original.) See also Doe v. McMillan, 412 U.S. 306 (1973).

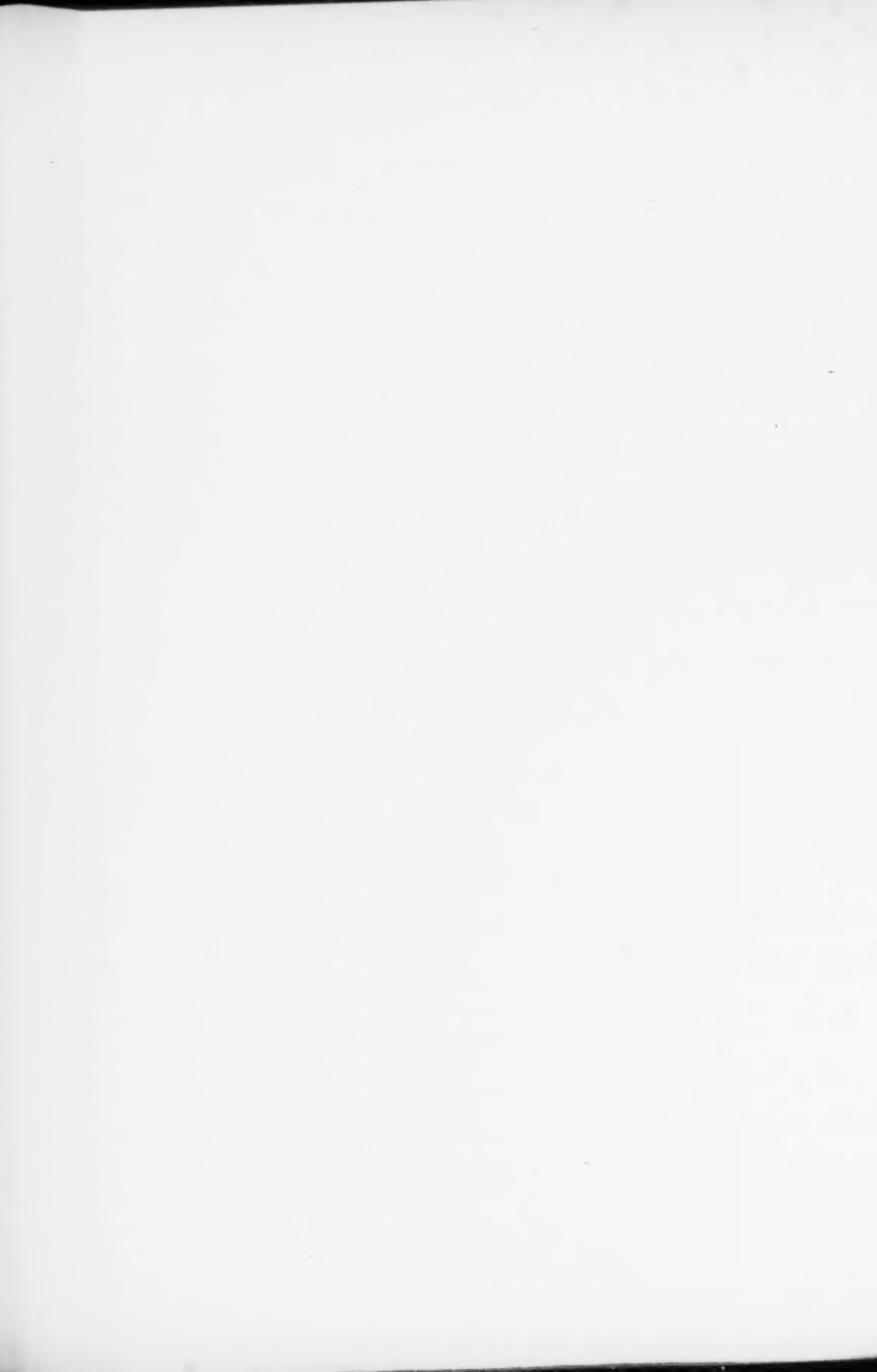


Thompson counters with two arguments why Barr only governs activities within the scope of the official's authority, and, Thompson argues, Maury's statements were not "made in line with his legitimate supervisory functions." See McKinney v. Whitfield, 237 U.S. app. D.C.

Appellants also relied at trial, supra note 10, and on appeal on Expeditions Unlimited, in which the United States Court of Appeals sustained summary judgment for the defendants, based on absolute privilege, in a libel action based on a letter by a Smithsonian Institution official "critical of plaintiff's capabilities in the field of underwater archeological excavation." 184 &S. App. D.C. at 399, 566 F.2d at 291. Relying on Barr, the court "remanded for limited inquiry whether his letter was within the outer perimeter of his duties." 184 U.S. App. D.C. at 403, 566 F.2d at 295. The court used the phrases "within the ambit of his employment" and "within the ambit of his discretion" interchangeably, 184 U.S. App. D.C. at 399, 566 F.2d at 291, indicating, perhaps, an expansive reading of Barr at odds with the Supreme Court's later interpretation in Westfall clearly limiting absolute immunity to the outer perimeter of an official's discretionary authority.



157, 736 F.2d 766 (1984) (federal bureaucrats exceed outer perimeters of responsibilities and act manifestly beyond line of duty when they resort to physical force to compel obedience of managerial subordinates). This contention has no merit. As Thompson's supervisor, Maury was authorized, if not required, to evaluate Thompson's performance--in contrast with the lack of authority to commit an assault, as in McKinney. The mere allegation that Maury used this authority to commit a tort, defaming Thompson, does not deprive Maury of whatever immunity he may be entitled to receive. See Barr, 360 U.S. at 572 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)); Aspen Exploration Corp. v. Sheffield, 739 P.2d 150, 154-55 (Alaska 1987). If this were not true,



official immunity would have no effect; any allegation that the official committed a tort would abrogate the immunity.

Second, Thompson suggests Barr is inapplicable because Barr involved a state law claim against a federal official, whereas Thompson presents state common law tort claims against, in legal effect, a state official. This distinction, without more, means nothing; but in any event, as we shall develop later, the rationale of Barr--as clarified more recently in Westfall, supra note 14--is consistent with the law of the District of Columbia, as we discern it, and may work to Thompson's advantage. We therefore turn to the issue of official immunity for District of Columbia officials.



A few early cases dismissed suits against District officials based on official immunity but without much explanation. The Municipal Court of Appeals of the District of Columbia, for example, held that the Collector of Taxes was not civilly liable for misinterpreting the statute authorizing tax collection, stating "the immunity which surrounds public officials in the performance of acts within the scope of their official duties is 'broad, deep and strong.'" Goldstein v. Pearson, 121 A.2d 260, 262 (D.C. 1956) (quoting Orvis v. Brickman, 90 U.S. App. D.C. 266, 269, 196 F.2d 762, 765 (1952)). See also Farrell v. Ward, 53 A.2d 46, 50, (D.C. 1947) (officials acting within scope of official duties not liable, in official capacity, for erroneous construction of law; liability, if any, is personal).



In 1971, in Carter v. Carlson, 144 U.S. App. D.C. 388, 391, 447 F.2d 358, 361 (1971), rev'd on other grounds, 409 U.S. 418 (1973), the United States Court of Appeals for the District of Columbia Circuit, in a case concerning the tort liability of a District police officer for assault and battery, as well as the liability of his supervisors for negligent training and supervision, held that while government officers are liable at common law for torts committed within the scope of their employment, in some circumstances they are protected by official immunity. The court distinguished "discretionary" functions, for which the officer is not liable, from "ministerial" acts, for which the officer is liable, stating that the difference between the two types of acts relates to the purposes of the respective functions.



144 U.S. App D.C. at 392, 447 F.2d at 362. Immunity is granted to encourage "'fearless, vigorous, and effective administration of policies of government.'" Id. (quoting Barr, 360 U.S. at 571). Accordingly, in determining whether a particular governmental function is discretionary, and thus falls within the scope of official immunity,

it does not suffice to consider simply whether the officer has "discretion" in the sense that he [or she] exercises judgment in choosing among alternative courses of action. The proper approach is to consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct.

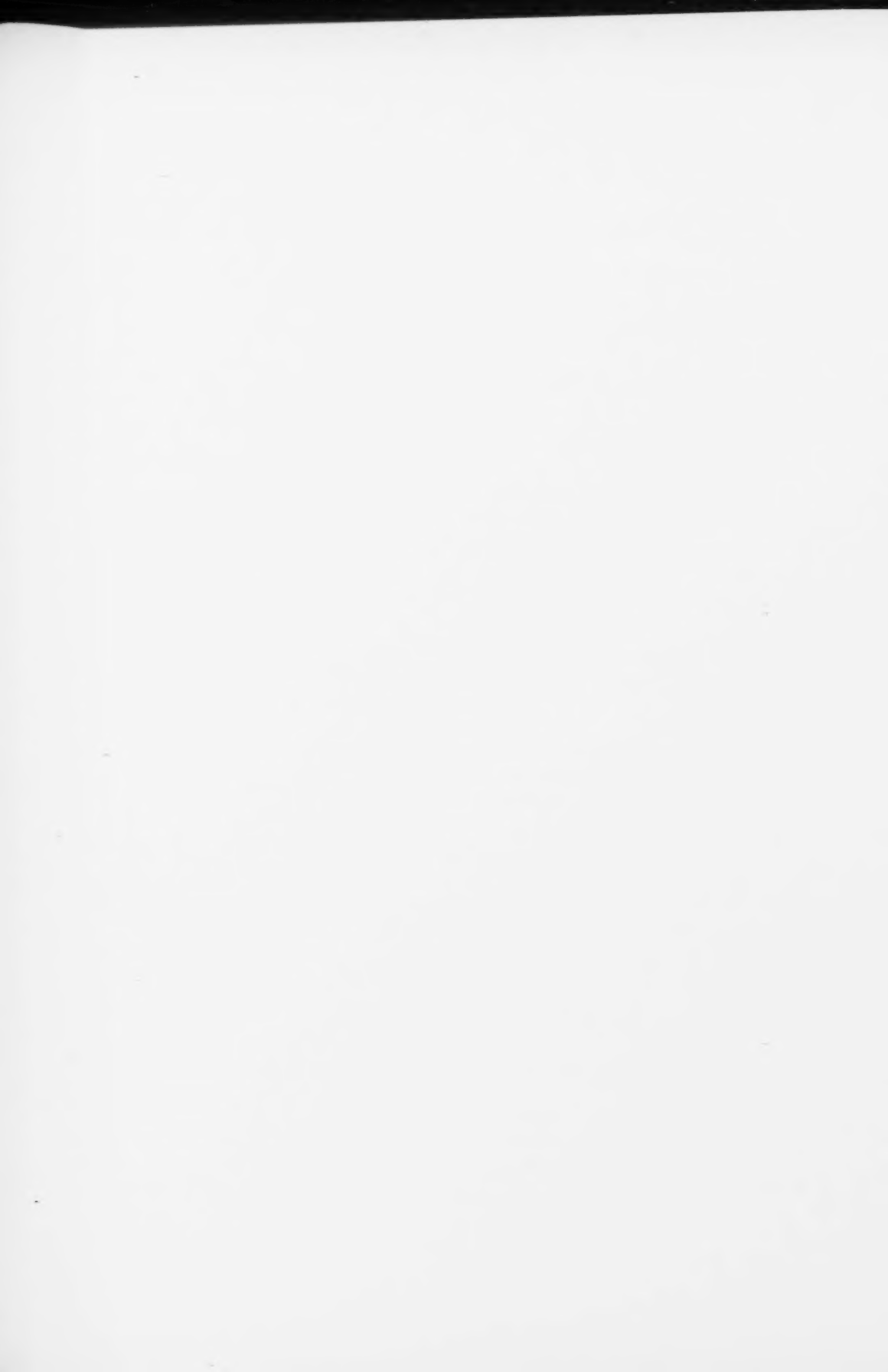


Id. (emphasis added). Although Carter is not binding on this court,¹⁵ the distinction drawn in Carter between discretionary and ministerial acts is consistent with later Supreme Court interpretation of the immunity established in Barr,¹⁶ with state cases analyzing official immunity,¹⁷ with the

¹⁵See Wade v. District of Columbia, 310 A.2d 857, 859 & n.2 (D.C. 1973) (en banc).

¹⁶See Westfall v. Erwin, 484 U.S. at 297-98 & n.4; supra note 14.

¹⁷See, e.g., Aspen, 739 P.2d at 155; Chamberlain v. Mathis, 151 Ariz. 551, 554-55, 729 P.2d 905, 909-10 (1986); Trimble v. Denver, 697 P.2d 716, 728-29 (Colo. 1985) (en banc); Ross v. Consumers Power Co., 20 Mich. 567, 631-37, 363 N.W.2d 641, 667-69 (1984); Libercent v. Aldrich, 149 Vt. 76,)))), 539 A.2d 981, 984 (1987); Chambers-Castanes v. King County, 100 Wash. 2d 275, 281, 669 P.2d 451, 456 (1983) (en banc); see also Tilton v. Dougherty, 126 N.H. 294, 300, 493 A.2d 442, 446 (1985); see generally 63A AM. JR. 2d (Public Officers & Employees §§ 362-63 (1984)).



RESTATEMENT,¹⁸ and with the approach taken by this court in Wade v. District of Columbia, 310 A.2d 857 (D.C. 1973) (en banc), in delimiting the contours of municipal immunity.

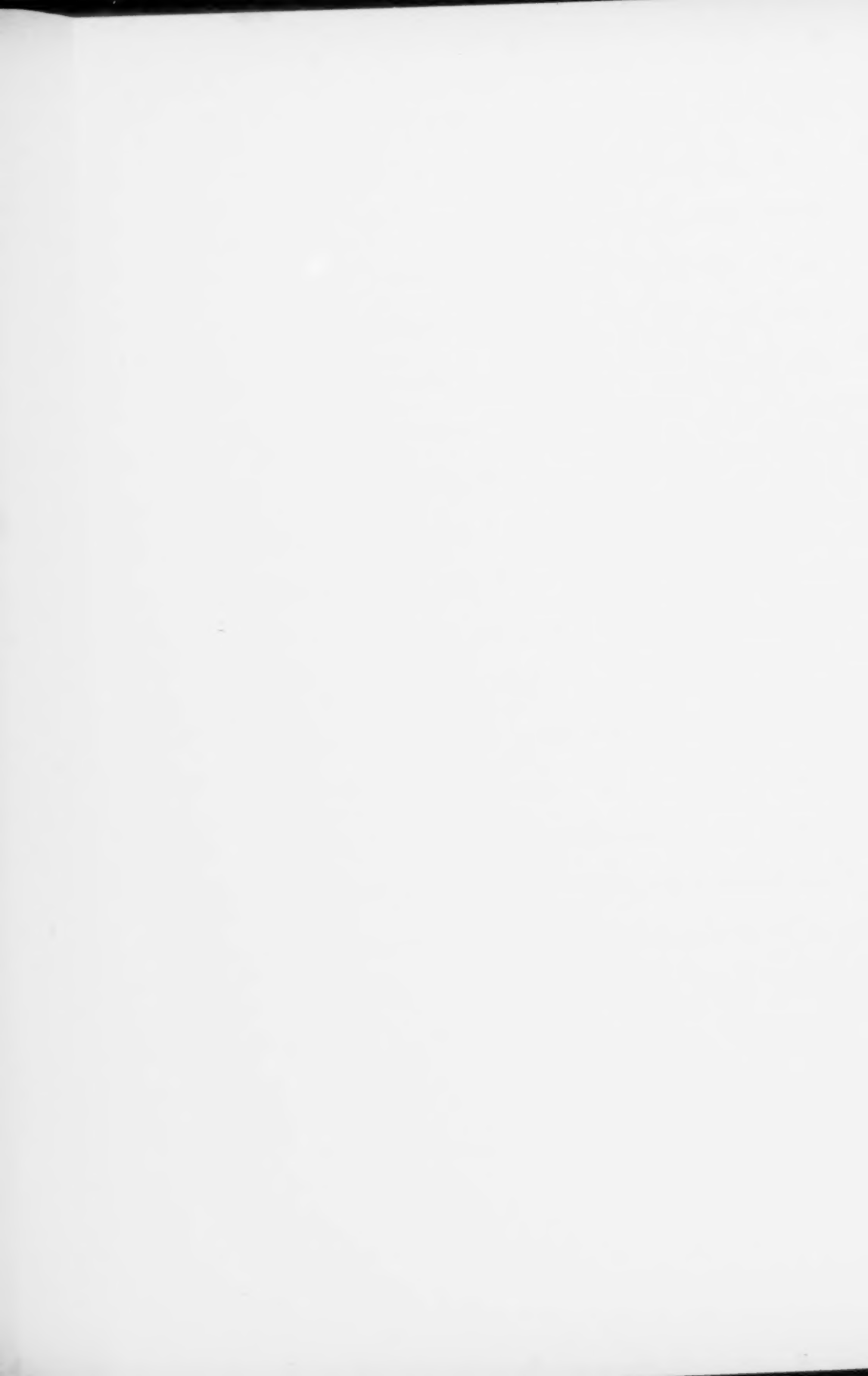
Wade and Carter were the same case, brought in different courts, but the only issue presented on appeal in Wade was whether the District of Columbia was liable under respondeat superior for the intentional torts of its employees acting within the scope of their employment. Id. at 859. Wade held the District is immune from liability for the torts of its employees only if the suit arises from acts committed in the exercise of a discretionary function. Id. at 860. The District is liable if the act is committed in the exercise of a

¹⁸ See RESTATEMENT (SECOND) OF TORTS § 895D (3)(a) (1979)



ministerial function. Id.

Later decisions of this court have developed this distinction. We have said, speaking generally, that discretionary functions concern "formulation" of policy, whereas ministerial functions concern "execution" of policy. Rustin v. District of Columbia, 491 A.2d 496, 500 (D.C.) cert. denied, 474 U.S. 946 (1985); see Chandler v. District of Columbia, 404 A.2d 946, 965-66 (D.C. 1979). More specifically, we have said that this distinction turns on whether imposition of liability would more likely encourage or inhibit conscientious, effective performance of the particular governmental function at issue. See Rustin, 491 A.2d at 500; Chandler, 404 A.2d at 966. One way of testing this distinction is to ask whether, in evaluating particular



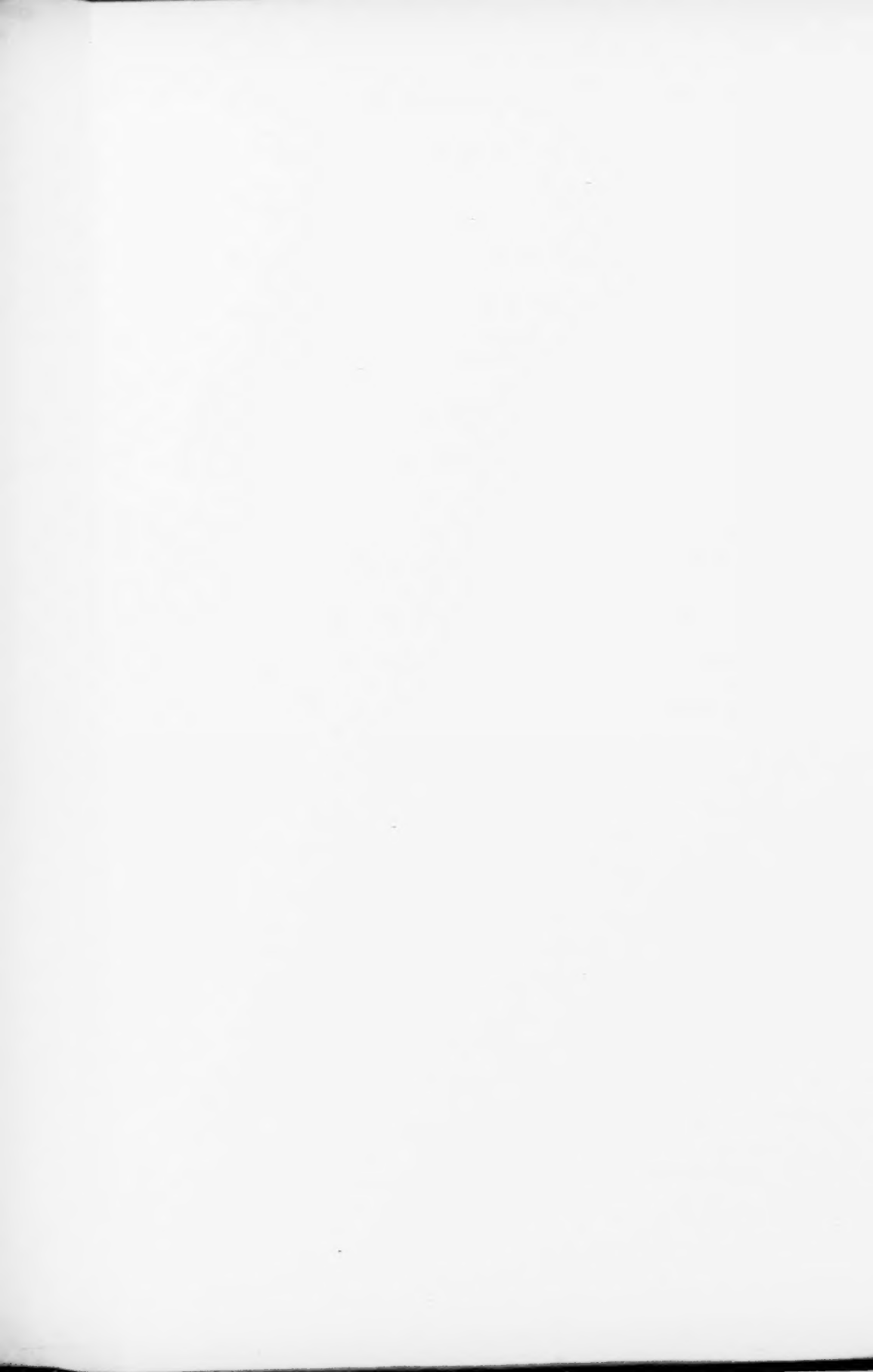
governmental functions, there is any reason "to believe a jury could render a sounder decision than those officials chosen, qualified, and prepared to make them." Id., quoted in Rustin, 491 A.2d at 500.

Although we have never squarely held (as the federal court of appeals did in Carter) that the issue of official immunity in a particular case turns on the discretionary-ministerial distinction, we believe that the line of cases beginning with Wade, and continuing through Chandler and Rustin, reflects a premise--which we adopt here as a sound judicial rule--that government employee immunity will depend on the same, discretionary-ministerial distinction that applies when determining immunity of

the sovereign.¹⁹ We perceive no sound basis for ruling, for example, that a government employee could be held liable for a discretionary act within the scope of the employee's authority but that the government employer would be immune from suit. Such a result would be fair neither to the employee nor to the plaintiff.

In taking this approach, we are adopting the rule, derived from Barr, applicable to federal officials charged with violations of state tort law. See

¹⁹This rule also is consistent with the early cases granting immunity to District officials for the misinterpretation or misapplication of law. Goldstein v. Pearson, 121 A.2d 260, 262 (D.C. 1956) (Tax Collector allegedly misinterpreted collection statute); Farrell v. Ward, 53 A.2d 46, 50 (D.C. 1947) (Commissioners and Water Register allegedly construed law erroneously). See also Chandler v. District of Columbia, 404 A.2d 964, 966 (D.C. 1979) (rejecting argument that employer-government should be liable for discretionary act even though employee-official is immune).



Westfall; supra note 14. We see no reason why a different rule should apply to District officials.

The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government." Barr v. Matteo, [360 U.S.] at 571.

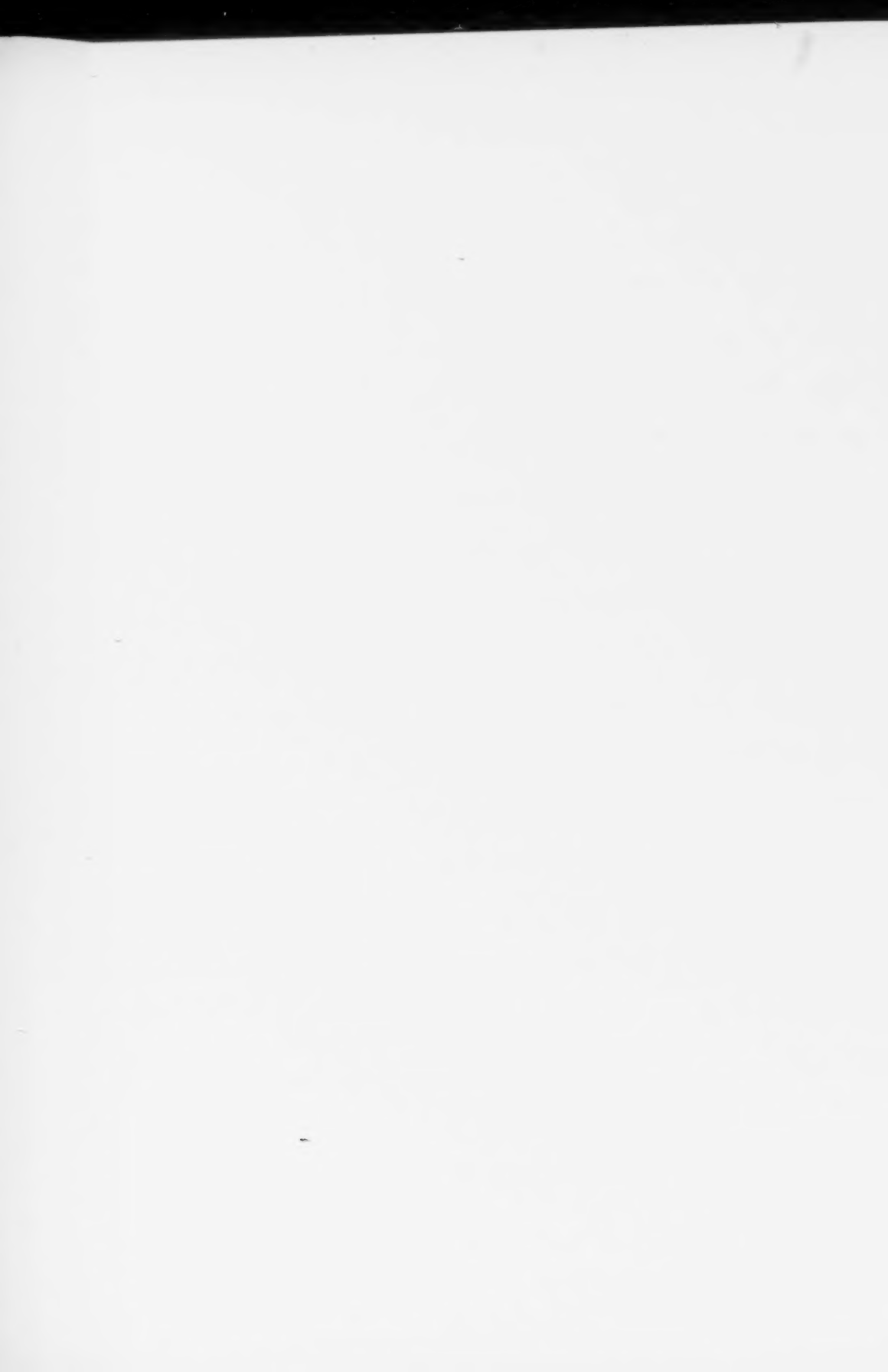
Id. at 296-97.

We are aware that the discretionary-ministerial distinction can be elusive, for "virtually all official acts involve some modicum of choice." Id. at 298.

Accordingly, absent legislative guidelines, we must select our own policy factors to determine whether the governmental action at issue allows significant enough application of choice to justify official immunity, in order to assure "fearless, vigorous, and effective" decision-making. Barr, 360 U.S. at 571. Persuaded by Professor Keeton's analysis, we believe the applicable policy factors should be "[1] the nature of the plaintiff's injury, [2] the availability of alternative remedies, [3] the ability of the courts to judge fault without unduly invading the executive's function, and [4] the

importance of protecting particular kinds of official acts." PROSSER & KEETON § 132, at 1062. See also RESTATEMENT (SECOND) OF TORTS § 895 D, comment f.

In applying these factors, a court must review the case from the victim's, as well as the public official's, perspective. Thus, in every case the court must weigh these competing interests, evaluating "whether the contribution to effective government" from official immunity would--or would not--outweigh the harm to the complainant. Westfall, 484 U.S. at 299. It follows that, in order to apply the four factors in a particular case, the court should know whether an official's immunity would be absolute or merely qualified (and thus malice-destructible) if the action were held to be discretionary; the respective burdens and



benefits of official immunity to each party cannot be determined without knowledge of exactly what the immunity means. Obviously, the larger the scope of the immunity, the more significant the decision would be to conclude an action is discretionary. The very availability of official immunity in a particular context, therefore, is properly influenced by the scope of that immunity. See id. Accordingly, as it turns out, we must decide this latter issue--whether Maury's immunity would be absolute or qualified, if his reports evaluating Thompson were discretionary--before deciding, finally, whether Maury's actions should be characterized as discretionary or merely ministerial.

We have already noted that the states are divided over whether official immunity for alleged defamation, in the



exercise of official discretion, is absolute or qualified, see supra note 11, and that the law of the District of Columbia is undecided, see supra note 12. We are satisfied, however, that the policies underlying official immunity expressed by the Supreme Court in Barr and Westfall, and repeated not only in Carter but also in this court's decisions in Chandler and Rustin, dictate a clear outcome: official immunity--if available at all--must be absolute. If official action is indeed discretionary, failure to afford absolute immunity would unduly inhibit the government official in the performance of "fearless, vigorous, and effective administration of policies of government." Barr, 360 U.S. at 571.

We therefore turn to Maury's actions: discretionary or ministerial? Looking at applicable policy factors, see



supra page 41, we initially acknowledge two that arguably cut against Maury's liability: (1) Thompson's injuries from the alleged defamation are economic, not physical, and (2) Thompson did have some alternative, administrative remedies through the OEA an the PERB (supra part III). See PROSSER & KEETON § 132, at 1062-64. On the other hand, it is unclear that Thompson's alternative remedies could provide effective redress for economic losses attributable to the alleged defamation. Furthermore, as to the third factor, it is far from clear on this record whether potential liability for defamatory employee evaluations would unduly invade the Library's or its employee-supervisor's ability to function. See d. at 1065-66. We cannot tell, for example, whether employee evaluation is based on prescribed

criteria and is typically routine or in some respects reflects policy choices. Thus, we cannot tell whether the jury, in holding a government supervisor accountable for a defamatory evaluation, would--or would not--be unduly interfering with a prerogative of the executive. See id. at 1065. For the same reasons, see id. at 1065-66, we cannot tell from this record, as to the fourth factor, how important it is to protect this particular kind of official act--an employee evaluation--from the scrutiny of a defamation action. In short, absent further trial court findings as to the applicable policy factors, we cannot say as a matter of law whether defendants-appellants have, or have not, carried their burden of

sustaining absolute immunity.²⁰

Accordingly, we reverse and remand the defamation count.

We emphasize again, however, that, to the extent a government supervisor's evaluations of an employee are required by law, they are absolutely privileged without regard to the discretionary-ministerial analysis. See, e.g., Goggins, 265 A.2d at 303; supra note 13 and accompanying text. Had Maury properly raised that defense in the trial court, he might well have benefitted from it. We do not foreclose him from raising that defense on remand. Because the trial court, in applying the policy

²⁰Because the allegedly libelous letter in Expeditions Unlimited was a communication by a higher official to an outside party and because, in any event, it is unclear how the federal court was interpreting Barr, see supra note 14, we believe the reasoning of Expeditions Unlimited, on which appellants rely, is not conclusive here.

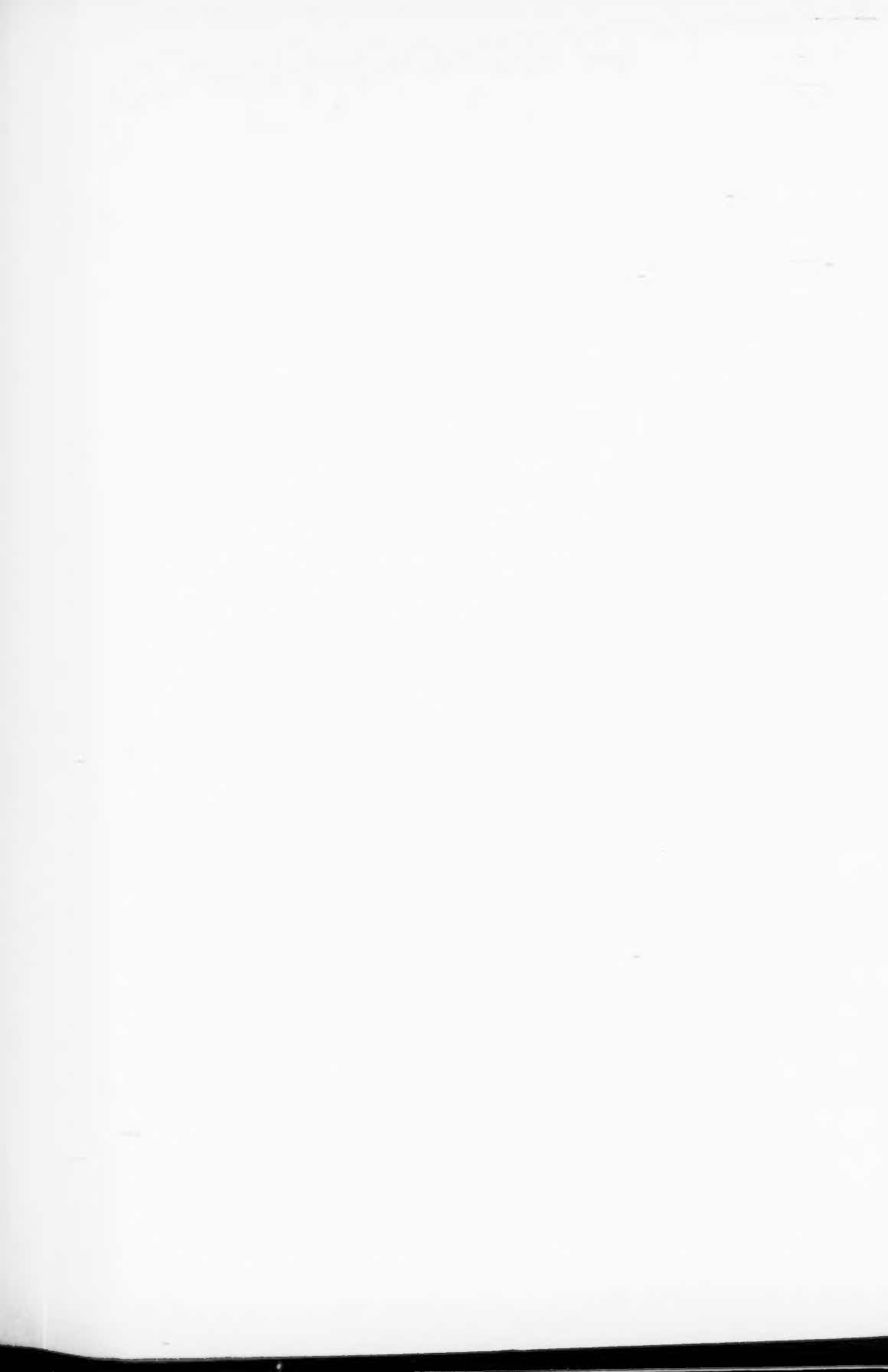


factors discussed above, will necessarily have to uncover evidence about the nature and requirements of employee evaluations in the library system, it would be inappropriate under the circumstances not to permit Maury to apply all available theories to that evidence in his defense. This is especially true because a "mandatory duty" inquiry is surly inherent in the trial court's consideration of the applicable policy factors.

In sum, because we cannot discern whether the trial court erred in denying a directed verdict, we reverse and remand for further findings as to the privilege and for a trial court ruling, once again, on that issue.

VI.

Appellants contend, with respect to Thompson's claims for assault and battery



and for defamation, that the trial court erroneously excluded relevant character evidence. They say that two types of proffered evidence were excluded: (1) evidence of Thompson's prior threats and assaults against co-workers, as well as her post-termination assault of a former Northeast co-worker; and (2) evidence of Maury's peaceful character.

The trial court, in response to Thompson's motion, issued an order in limine, instructing defense counsel to refrain from asking about, commenting about, referring to or eliciting testimony from any witness relating to or regarding any purported episodes of assaultive conduct engaged in or perpetrated by the Plaintiff Patricia Joan Thompson, except for the assaultive conduct that is the subject of this



action.

Because of this ruling, defense counsel was prevented from presenting testimony about Thompson's assaults of co-workers that resulted in her transfer to the Northeast branch and of a post-termination fight with a former co-worker. In addition, the trial court limited testimony about Thompson's threats to harm Neal and about the names Thompson called Neal. Nor did the court allow evidence of Maury's peaceful character.

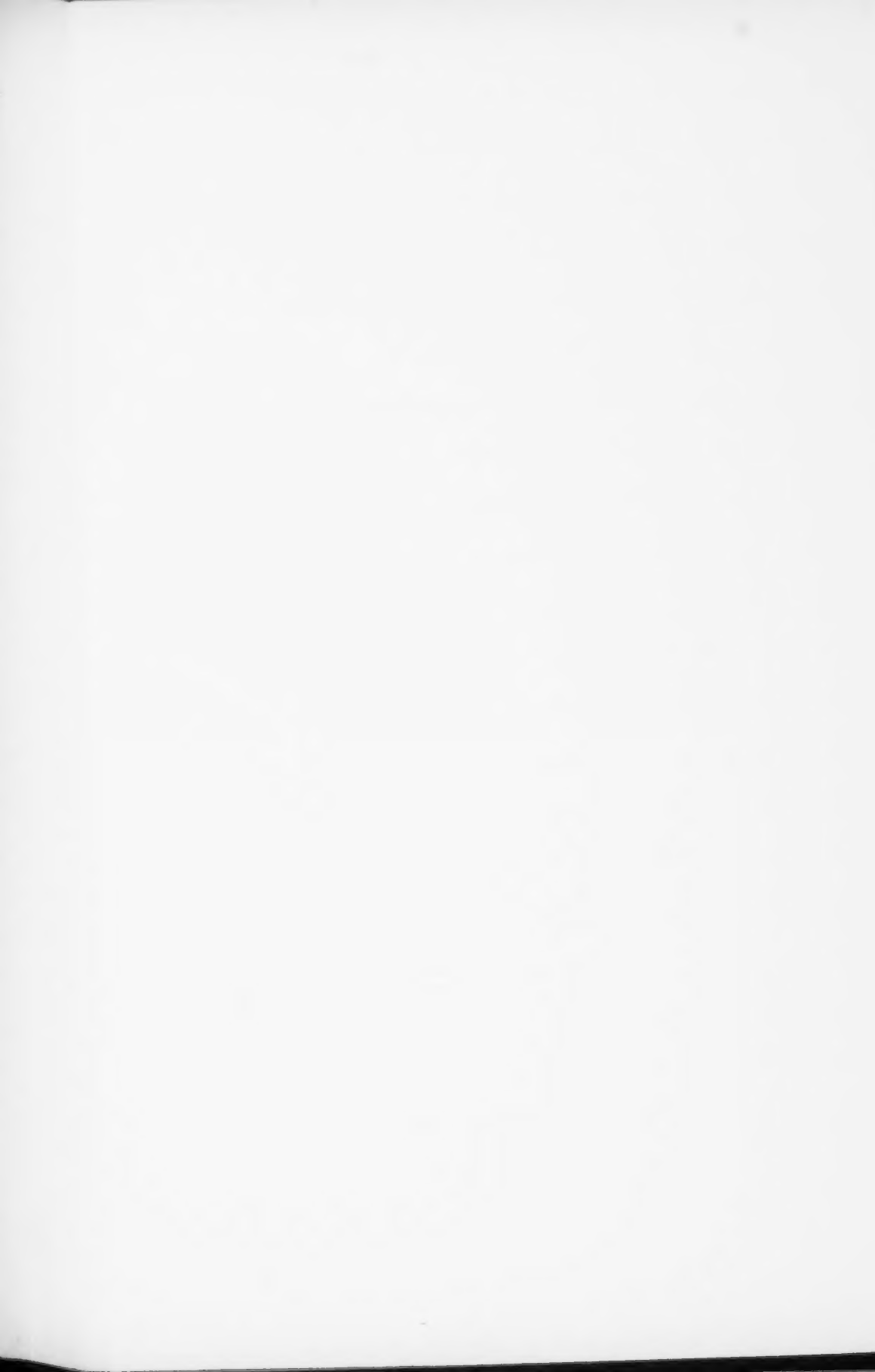
In Phillips v. Mooney, 126 A.2d 305, 308 (D.C. 1956), we held that, as a general rule in civil assault and battery cases, neither party's character "is an issue and cannot be the subject of attack, unless it is first attacked or supported by the adversary, or placed in issue by the nature of the proceeding



itself." In Phillips, the plaintiff claimed to be the victim of an unprovoked attack while the defendant pleaded self-defense claim, the court suggested character for peace and quiet in issue." Id. Although Phillips involved a self-defense claim, the court suggested character for peace and quiet is at issue generally whenever "the main issue [is] who was the aggressor." Id. Similarly, in Johns v. United States, 434 A.2d 463, 469 (D.C. 1981), a criminal assault case, we explained that evidence about the assault victim's violent character is relevant to a self-defense claim not only to show whether the defendant was in reasonable fear of imminent great bodily injury but also to answer "the objective question who was the aggressor."

The instant case does not include an issue of self-defense, and thus Phillips

and Johns do not squarely decide the evidentiary issue presented. But these cases do, nonetheless, support appellants' argument that evidence of Thompson's and Maury's character for peace and quiet is relevant to determining who was the aggressor. Moreover, courts of other jurisdictions allow evidence of the parties' character for peace and quiet in cases of mutual allegations of assault, as in the present case. See Feliciano v. Honolulu, 62 Haw. 88, 92, 611 P.2d 989, 992 (1980); Carrick v. McFadden, 216 Kan. 683, 533 P.2d 1249 (1975); J.C. Penney Co. v. Gravelle, 62 Nev. 434, 446, 155 P. 2d 477, 480 (1945); Strickland v. Jackson, 23 N.C. App. 603, 606-08, 209 S.E.2d 859, 862-63 (1974); Bell v. Philadelphia, 341 Pa. Super. 534, 544, 491 A.2d 1386, 1391 (1985); see also Annotation, Admissibility of



Evidence of Character or Reputation of
Party in Civil Action for Assault on
Issues Other than Impeachment, 91

A.L.R.3d 718, § 16 (1979).²¹ As in criminal cases, this evidence is admitted to show that each party acted in conformity with his or her character and is justified by the rationale that there is a "special need beyond that in most cases of charges of crime in civil actions to know the dispositions of the parties. . . ." CLEARY, MCCORMICK ON EVIDENCE 571 n.5 (1984); see Pino v. Koelber, 389 So. 2d 1191, 1193 (Fla. Dist. Ct. App. 1980); Niemeyer v. McCarty, 221 Ind. 688, 694, 51 N.E.2d

²¹Other cases, while dealing with character evidence in the context of a self-defense claim to a criminal prosecution, state the rule more broadly so as to include allegations of mutual assault. See e.g., Pino v. Koelber, 389 So. 2d 1191, 1193 (Fla. Dist. Ct. App. 1980); Niemeyer v. McCarty, 51 N.E.2d 365, 370 (Ind 1943).



365, 368 (1943); Strickland, 23 N.C. App. at 606, 209 S.E.2d at 862; Bell, 341 Pa. Super. at 545, 491 .2d at 1391.

This rationale is consistent with our ruling in Phillips that evidence of the parties' character was relevant to determine who was the aggressor. 126 A.2d at 308. Phillips, unlike Johns (the criminal case), allowed evidence about the character of both parties once character was at issue. Phillips, 126 A.2d at 308. In line with precedent from other jurisdictions, we extend the rule established in Phillips to allow evidence of the peaceful or violent character of the parties in civil assault cases in which mutual assault is alleged, in order to help prove who was the aggressor.

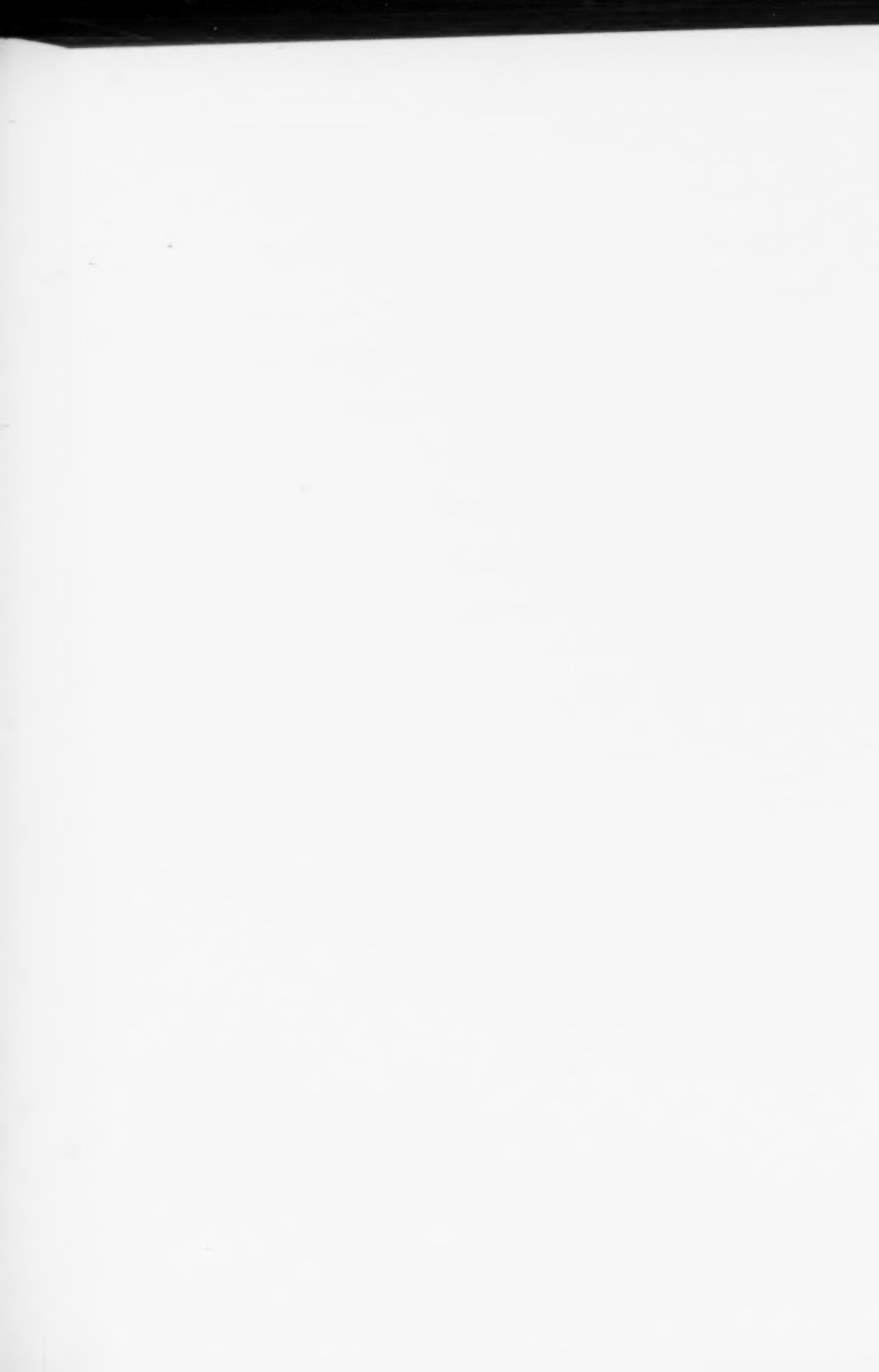
In the present case, both as to Thompson's claim of assault and battery and as to Maury's counterclaim of assault

and battery, neither party claimed self-defense. But, both parties claimed the other party initiated the assault. Thus, the issue at trial was, "Who was the aggressor?" The trial court erred by not admitting evidence of Thompson's threats and assaults of her co-workers and, further, by not admitting evidence of Maury's peaceful character. Since the evidence at trial of Thompson's and Maury's alleged assaults of each other consisted mainly of the testimony of Maury and Thompson, making the issue essentially one of credibility, the error was not harmless. It warrants reversal and remand for a new trial on the assault claims. See Montgomery v. Dennis, 411 A.2d 61 (D.C. 1980) (reversing and remanding where evidence corroborating appellant's testimony that he had been assaulted was excluded).



In addition, Thompson's defamation claims are premised, at least in part,²² on Maury's allegedly false accusation that Thompson assaulted him. At trial, Maury testified that he did not assault Thompson, that she in fact assaulted him, and, therefore, that he did not lie about the incident when reported it to his superiors. Since truth is an absolute defense to defamation claims, see Ford

²²In her brief on appeal, Thompson argues that her defamation claim "arises exclusively from false statements made by Alfred Maury wherein he claimed that Patricia Thompson had assaulted him." At trial, however, Thompson's claims of defamation were far broader. We need not decide how limited Thompson's defamation claims were because the jury's finding of defamation did not differentiate between allegedly false accusations of assault and battery and other allegedly false statements. Therefore, if part of the verdict must be reversed and remanded, the entire verdict must be reversed and remanded. See District of Columbia v. White, 442 A.2d 159, 165 (D.C. 1982) (erroneous submission of theory of negligence to jury undermines jury verdict where jury did not specify theory underlying its finding).



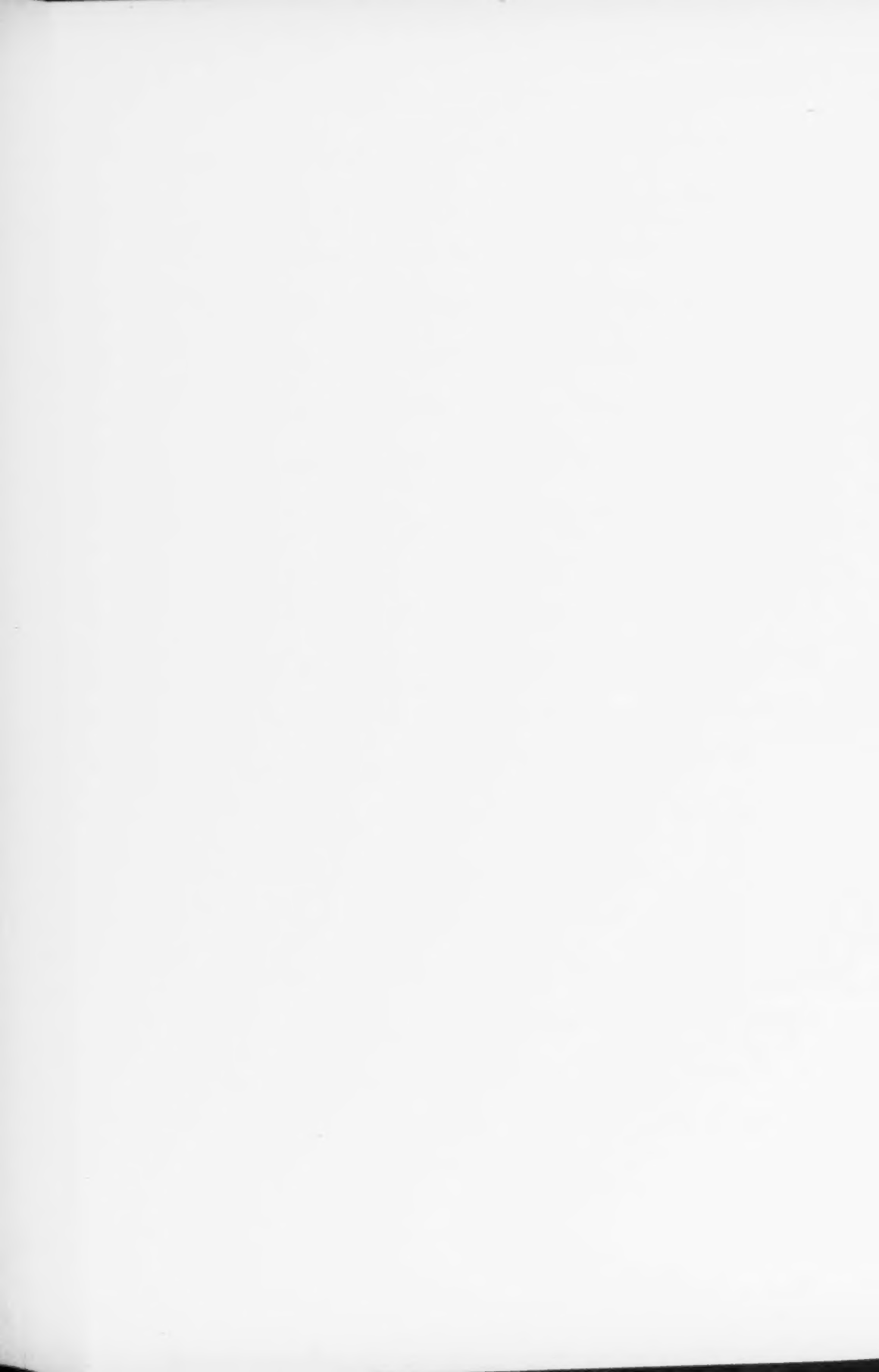
Motor Credit Co. v. Holland, 367 A.2d 1311, 1313 n.1 (D.C. 1977), the jury could not rationally find for Thompson on her defamation claim if the jury believed Maury's version of the incident. Because the evidence of Thompson's threats and assaults of her co-workers is admissible to prove that she initiated the assault, this evidence is relevant to the defense of truth. Accordingly, because the defense of truth turned on the jury's assessment of the credibility of Maury and Thompson, we must also reverse with respect to the defamation count and remand for a new trial. In the event that Maury is entitled to an absolute privilege, however, see supra Part V.B., the defamation count must be dismissed.

VII.

Finally, appellants contend they are entitled to a new trial because the trial

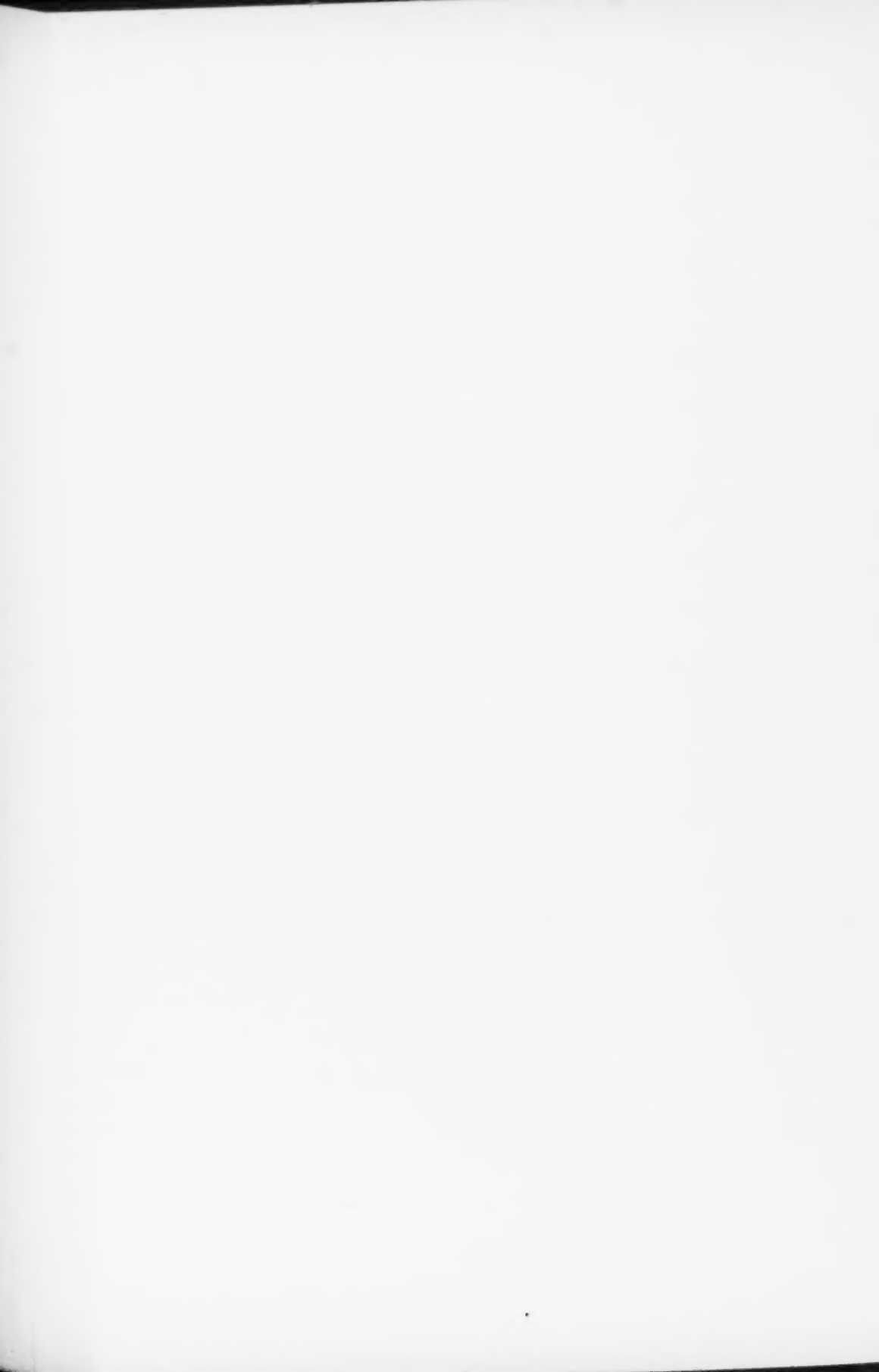
judge, over objection, improperly injected himself into the proceedings and deprived them of their right to a fair trial guaranteed by the due process clause of the fifth amendment. Because we reverse and remand for other grounds, we address this contention only for purposes of evaluating whether the case should be remanded to the same or a different judge.

The trial judge may "make proper inquiry of any witness when he [or she] deems that the end of justice may be served thereby and for the purpose of making the case clear to the jurors. Griffin v. United States, 83 U.S. App. D.C. 20, 21, 164 F.2d 903, 904 (1947), cert. denied, 333 U.S. 857 (1948). The judge, however, must remain a "disinterested and objective participant in the proceedings." Billeci v. United



States, 87 U.S. App. D.C. 274, 283, 184 F.2d 394, 403 (1950). The right to a fair trial "may be imperiled by an apparent breach of the atmosphere of judicial evenhandedness that should pervade the courtroom." United States v. Barbour, 137 U.S. App. D.C. 116, 118, 420 F.2d 1319, 1321 (1969). This line can be crossed by too extensive questioning by the trial court or by the trial judge's alignment with one of the parties. Haughton v. Byers, 398 A.2d 18, 21 (D.C. 1979).

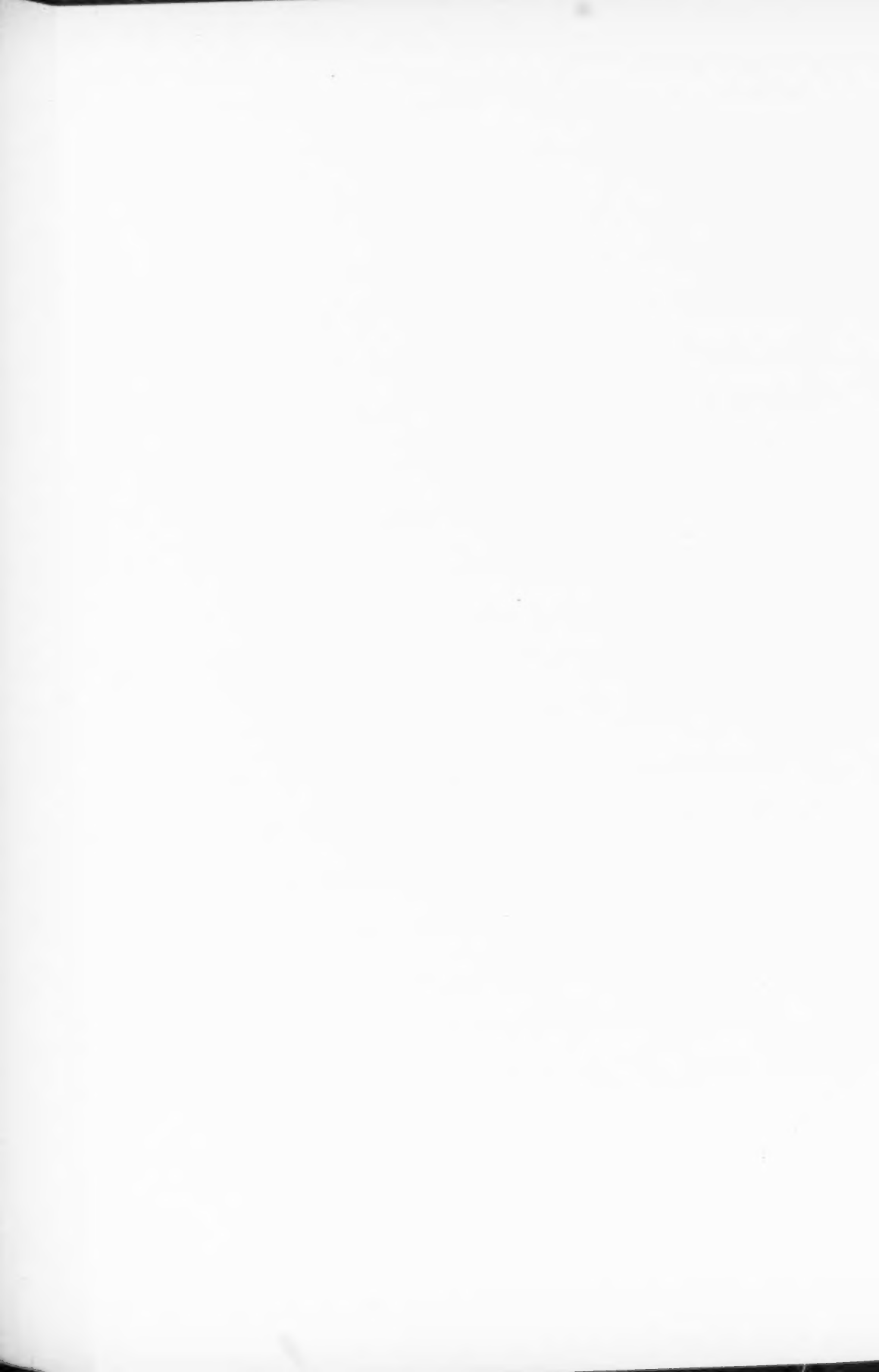
After a thorough review of the transcript of the trial, we are satisfied that the cumulative impact of the trial court's questions and comments may have swayed the jury to favor Thompson. See, e.g., trial transcript at 164, 281, 326, 384, 400, 1270-71, 1273, 1277, 1412-13, 1449, 1539-46, 1549, 1624, 1698-1700.



Accordingly, on remand the case should be assigned to a different judge.

VIII.

In sum, we reverse on all counts. We remand to the trial court the count for intentional infliction of emotional distress with an order to vacate the judgment against both the District of Columbia--defamation and assault and battery--with directions to stay all further proceedings until Thompson has had a reasonable time to file for disability benefits under CMPA for her claimed injuries. If DOES concludes that Thompson's claims fall within CMPA, the trial court shall dismiss Thompson's claims against the District. But see supra note 6. If DOES decides the claims do not fall within CMPA, the trial court shall order a new trial as to the District. We remand the remaining claims



against Maury--defamation and assault and battery--for further proceedings.²³

Reversed and remanded.

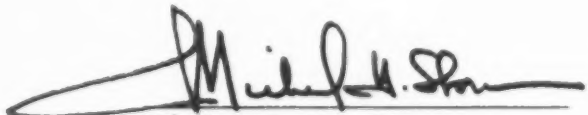
²³Appellants present two additional claims of error. First, appellants argue the trial court excluded evidence of an alternative source of Thompson's emotional distress, the breakup with her boyfriend. Since we dismiss the claim for intentional infliction of emotional distress on other grounds, we need not reach this argument. Second, appellants argue they are entitled to a new trial because the trial court improperly instructed the jury. It appears the trial court did erroneously instruct the jury in such a way that it could have awarded double damages: The court instructed that if the jury found for Thompson on any tort count, she could be compensated for any past and future "loss of earnings" and, in addition, if it found Thompson had been defamed, the jury could award damages for "such sums" as would compensate her for injuries to her "occupation as a library technician." Because we order a new trial, we need not decide whether this error would entitle appellants to a new trial on damages.

CERTIFICATE OF SERVICE

I, Michael H. Stone, a member of the Bar of the Supreme Court of the United States, certify that I have caused to be delivered, on this 16th day of September, 1991, an original and forty (40) copies of the Petition for a Writ of Certiorari to the District of Columbia Court of Appeals to the Clerk of the United States Supreme Court, Washington, D.C. 20543 and three (3) copies to be sent by first class mail, postage prepaid to:

Donna M. Murasky
Assistant Corporation Counsel
District Building, Room 305
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for the Respondents

A handwritten signature in black ink, appearing to read "Michael H. Stone", with a long horizontal flourish extending to the left.

Michael H. Stone

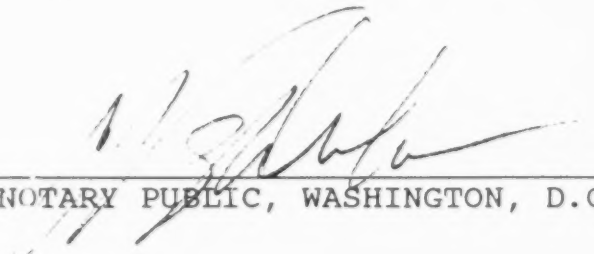
NOTARIAL VERIFICATION

WASHINGTON

: SS

DISTRICT OF COLUMBIA

Michael H. Stone appeared before me this 16th day of September, 1991, and stated upon his affirmation that the contents of this Certificate of Service are true.



NOTARY PUBLIC, WASHINGTON, D.C.

My Commission Expires:

NANCY DUHON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires January 1, 1995